(1)

NO. 98-9741-CSY Title: Thomas Knight, aka Askari Abdullah Muhammad, Petitioner

CAPITAL CASE v. Florida

Docketed: June 11, 1999 Court: Supreme Court of Florida

Entry	Date	Proceedings and Orders
	Jun 9 1999	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 10, 1999)
	Jul 12 1999	Order extending time to file response to petition until August 10, 1999.
	Aug 10 1999	Brief of respondent Florida in opposition filed.
	Aug 20 1999	Reply brief of petitioner Thomas Knight filed.
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	Nov 1 1999	REDISTRIBUTED. November 5, 1999
	Nov 8 1999	Petition DENIED. Opinion by Justice Stevens respecting the denial of the petition for a writ of certiorari. Opinion by Justice Thomas concurring in the denial of the petition for a writ of certiorari. Opinion by Justice Breyer dissenting from the denial of certiorari. (Detached opinion.)

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Supreme Court, U.S.
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No. 98-9741

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

THOMAS KNIGHT,
N/K/A ASKARI ABDULLAH MUHAMMAD,

Petitioner,

-vs-

FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

1. Whether executing a prisoner nearly a generation after he was convicted and sentenced to die violates the prohibition against cruel and unusual punishments of the Eighth Amendment to the United States Constitution.

2. Whether imposition of the death penalty through the retrospective application of a statutory aggravating factor enacted after the commission of the crimes violates the prohibition against ex post facto punishments contained in Article I, section 10 of the United States Constitution.

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

THOMAS KNIGHT,
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Petitioner,

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FLORIDA,

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner Thomas Knight, now known as Askari Abdullah Muhammad[1], prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida affirming the sentences of death in this case.

OPINION BELOW

The opinion of the Supreme Court of Florida is reported as Knight v. State, 721 So. 2d 287 (Fla. 1998), rehearing denied and revised opinion issued, 24 Fla. L. Weekly S135

[1]Petitioner's name was legally changed in 1982. In this petition he will be referred to as Mr. Muhammad, as he was in the federal court and in the state trial court on resentencing.

(Fla. March 11, 1999). The original opinion is reproduced in the Appendix to this petition as A-1 through A-16. The order denying rehearing is reproduced at A-17. The revised opinion is reproduced at A-18 through A-38.

JURISDICTION

The judgment of the Florida Supreme Court was entered on November 12, 1998. A petition for rehearing was timely filed and was denied on March 11, 1999. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a), the petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS AT ISSUE

1. This case involves the Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishments."

2. It also involves the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> [N]or shall any state deprive any person of life . . . without due process of law . . . .

3. This case also involves Article I, Section 10 of the United States Constitution, which provides in pertinent part:

> No state shall . . . pass any . . . ex post facto law . . . .

STATEMENT OF THE CASE

The petitioner was originally sentenced to death on April 21, 1975 for first-degree

murders committed in July 1974. His convictions and death sentences were affirmed by the Florida Supreme Court on automatic direct appeal, Knight v. State, 338 So. 2d 201 (Fla. 1976), and post-conviction relief was denied on state collateral review, Knight v. State, 394 So. 2d 997 (Fla. 1981); Muhammad v. State, 426 So. 2d 533 (Fla. 1982). He was successful, however, in his attempt to vindicate his federal constitutional rights on federal habeas review. In Knight v. Dugger, 863 F. 2d 705 (11th Cir. 1988) (rehearing denied on August 23, 1989; mandate issued thereafter), the Eleventh Circuit Court of Appeals agreed that the Florida courts had imposed the death sentence in violation of the United States Constitution. After a new sentencing proceeding, he was again sentenced to death, on February 20, 1996. The Florida Supreme Court affirmed on mandatory, direct appeal on November 12, 1998. Petitioner's motion for rehearing and the state's motion for clarification were denied, and a revised opinion issued, on March 11, 1999.

At resentencing, evidence was presented regarding Mr. Muhammad's background, the circumstances of the crimes, and his confinement on death row. His childhood was one of poverty, hunger, and brutal beatings. Much of it was spent in state custody. At age nine, after an arrest for theft, he was committed to Florida School for Boys, the youngest child ever sent to that institution, where the children were more typically fifteen or sixteen years old. At age fifteen he was sent to adult prison for three-and-a-half years on a conviction for burglary. At age nineteen he was committed to a state mental hospital. As summarized by the Florida Supreme Court:

Numerous witnesses testified on Knight's behalf. They presented testimony that Knight, the second oldest of nine children, came from a family with a history of mental illness and neurological problems. Knight's sisters Mary Ann, Doris, and Edna, as well as Deputy Patrick Duval, detailed the poverty, hunger, and brutal beatings Knight had sustained during his childhood in Fort Pierce. Knight's father was an alcoholic who had stopped providing for his family in 1960. Knight's father beat him often and with brutality. The Knight children often went without food or clothing. In June 1960, Knight's father raped Knight's sister Mary Ann. Knight, nine years old at the time, either witnessed his sister's rape and tried to stop it, or was told about it by Mary Ann immediately thereafter.

Knight was first arrested at age nine for theft. When he was arrested on the same charge several months later, he was committed to the Florida School for Boys, the youngest child ever sent there. He was continually in trouble thereafter, until at age fifteen he was sent to state prison on a burglary conviction. At age nineteen, he was committed to the Northeast State Hospital where he was diagnosed with drug and poison intoxication, excessive drinking, and paranoid personality.

A-21.

Before his release from the hospital, he was evaluated by Dr. Arthur Wells, who reported that there was a good chance the patient would become psychotic again, "perhaps being dangerous to others." (R. 356, T. 2738). Out-patient treatment was recommended, but was not likely to be available in the patient's community. Accordingly, the prognosis was "somewhat guarded." (R. 356; T. 2740).

After his release from the hospital, petitioner was convicted of attempted grand larceny and sentenced to two-and-a-half years in prison. While in prison, he was given the psychotropic drug Thorazine, as he had been at the hospital. (T. 2527-28). He was released

in 1972 and went to live with his sister in Miami.

On July 17, 1974, he abducted Sydney and Lillian Gans and forced them to drive to a bank in downtown Miami to get $50,000. While inside the bank, Mr. Gans reported the abduction, and FBI and local police were alerted. Mr. Gans returned to the car with the money. The car then drove to south Dade County, being kept under surveillance by numerous law enforcement officers. The car went behind a ridge which ran alongside a canal. Shortly thereafter, Mr. and Mrs. Gans were found shot to death. Each had been shot once through the neck, from the rear seat of the vehicle. Death had been instantaneous or nearly instantaneous. After a massive manhunt, petitioner was apprehended in a weeded area about 2,000 feet from the vehicle.

On April 21, 1975, the petitioner was convicted on two counts of first-degree murder and sentenced to death. He was placed on death row in Florida State Prison. The convictions and sentences were affirmed on direct appeal in 1976.

On October 12, 1980, while his clemency petition and post-conviction appeal were still pending, Mr. Muhammad fatally stabbed a prison guard, Officer Richard Burke. Earlier in the day Mr. Muhammad was told that because he had not shaved he could not receive a scheduled visit from his mother. Although he had been issued a pass which, for medical reasons, allowed him to clip his beard short instead of shaving, his pass had expired. That evening, while he was being escorted to the shower, he stabbed Officer Burke with a sharpened serving spoon. Another guard witnessed the attack, but was unable to intervene

in time. (T. 2318-19).

The lawyers appointed to represent Mr. Muhammad at his trial for the murder of Officer Burke "were concerned about his mental state from the start." Muhammad v. State, 494 So. 2d 969, 970 (Fla. 1986). They intended to present an insanity defense, and moved for a competency hearing, but Mr. Muhammad would not cooperate with doctors appointed to determine his competency. Id. at 971. Appointed counsel was allowed to withdraw, and the court granted Mr. Muhammad's motion to proceed pro se. Id. at 971-72. His defense at trial consisted solely of holding the state to its burden of proof. Id. at 972. He was convicted and sentenced to death. The conviction and death sentence were affirmed on direct appeal. His post-conviction appeal in that case is still pending.

After the Burke homicide, Mr. Muhammad was placed in a special isolation cell in the area of the prison (then known as Q Wing, and now called X Wing) where the electric chair is located. He remained in isolation for twelve years, from 1980 to 1992. Normally, death-row inmates are kept in single-man cells, equipped with a toilet, sink, and a small black-and-white television. They are able to communicate through the bars with other inmates on the same corridor, and are allowed two hours in the yard each week. (T. 2256, 2295, 3536). X Wing is different. The isolation there is total. There are no yard privileges and no television. (T. 2296, 3547). There is no view to a corridor. The cell is completely enclosed. (T. 3536).

Mr. Muhammad made repeated efforts, through the prison grievance system, to be

transferred from the complete isolation of X Wing back to normal death row. However, he continued to accumulate disciplinary reports, mostly having to do with his refusal to respond to the name Thomas Knight. He had converted to Islam and in 1982 his name was legally changed to Askari Abdullah Muhammad (T. 3533). The prison, however, would not recognize the change of name. (T. 2292-93). Eventually a compromise was reached under which, at master count, he would give his prison number, followed by his Islamic name. (T. 3534-35). He finally succeeded in being returned to normal death-row status in 1992. (T. 2296, 2314-15, 3536).

Meanwhile, in 1989, the Eleventh Circuit Court of Appeals reversed the death sentences imposed for the murders of Mr. and Mrs. Gans and remanded for resentencing. The public defender appointed to represent Mr. Muhammad withdrew because of a conflict of interest, and other counsel was appointed. Competency hearings were held in 1992 and 1994. There was interlocutory appellate litigation concerning the payment of defense expert witnesses. Continuances were granted to both the state and the defense, because of scheduling conflicts and other reasons. During this time, except when brought down to Miami for competency hearings, Mr. Muhammad remained on death row.

The resentencing hearing took place in January and February 1996. The jury recommended death by a vote of 9 to 3. On February 20, 1996, the judge sentenced Mr. Muhammad to death. An automatic direct appeal was taken to the Supreme Court of Florida.

On appeal, petitioner asserted that application of the statutory aggravating

circumstance that the capital offense had been cold, calculated and premeditated ("CCP") to the crimes he committed in 1974 violated the constitutional prohibition against ex post facto laws because the legislature did not enact that aggravator until 1979. The Florida Supreme Court rejected this claim, stating that "we have previously determined that application of the CCP aggravator in this situation is not an ex post facto violation. Combs v. State, 403 So. 2d 418 (Fla. 1981)." A-29.

Petitioner also claimed that to execute him after he had endured two decades on death row would constitute unconstitutionally cruel and unusual punishment. The Florida Supreme Court rejected this point on appeal, stating, at A-34:

> Finally, Knight claims that to execute him after he has already endured more than two decades on death row is unconstitutionally cruel and unusual punishment. He also argues that Florida has forfeited its right to execute Knight under binding norms of international law. Although Knight makes an interesting argument, we find it lacks merit. As the State points out, no federal or state courts have accepted Knight's argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay. *See, e.g., White v. Johnson*, 79 F.3d 432 (5th Cir. 1996); *State v. Smith*, 931 P.2d 1272 (Mont. 1996). We also note that the Arizona Supreme Court recently rejected this precise claim. *See State v. Schackart*, 947 P.2d 315, 336 (Ariz. 1997) (finding "no evidence that Arizona has set up a scheme prolonging incarceration in order to torture inmates prior to their execution", *cert. denied*, No. 97-9613 (U.S. Oct. 5, 1998). Second, we also consider that irrespective of the status of this case, Knight has been and will remain incarcerated on death row for his 1980 murder of Officer Burke until that case is finalized. We similarly reject Knight's claim under international law.

WHY THE WRIT SHOULD BE GRANTED

I.

EXECUTING THE PETITIONER NEARLY A GENERATION AFTER HE WAS ORIGINALLY CONVICTED AND SENTENCED TO DEATH WOULD VIOLATE THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Introduction and Summary.

Mr. Muhammad was convicted of first-degree murder and sentenced to death on April 21, 1975. Fourteen-and-a-half years later, the federal circuit court of appeals held that the death sentence had been imposed in violation of the United States Constitution. Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988) (rehearing denied August 23, 1989; mandate issued thereafter). The state again sought the death penalty, and obtained it in February 1996. Automatic, mandatory appellate review followed.[2] The Florida Supreme Court affirmed in November 1998, denying rehearing in March 1999.

Thus, it has been more than twenty-four years since Mr. Muhammad was convicted and placed on death row. If execution ever takes place, it will come nearly a generation after

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[2]Florida's death penalty statute provides for "automatic review" by the Florida Supreme Court, § 921.141(4), Fla. Stat. Because the statute establishes a duty to examine every case in which the death sentence is imposed, the Florida Supreme Court has denied death-sentenced prisoners' requests to dismiss their appeals. See Goode v. State, 365 So. 2d 381, 384 (Fla. 1978); Klokok v. State, 589 So. 2d 219, 221-22 (Fla. 1991); see also Hill v. State, 656 So. 2d 1271, 1272 (Fla. 1995) (denying prisoner's motion to proceed pro se on appeal).

entry of the judgment of conviction and original sentence of death. This extraordinarily long time between conviction and execution of sentence is the result of the state's failure to afford Mr. Muhammad a constitutional capital sentencing hearing back in April 1975, a failure which made necessary a new sentencing hearing and subsequent automatic appeal. The delay must therefore be attributed to the state.

To execute Mr. Muhammad after this extraordinary delay would constitute cruel and unusual punishment in violation of the Eighth Amendment. Execution after such an extended period of time does not serve the constitutionally-permissible purposes of capital punishment, it is contrary to the intent of the Framers, and it would have been considered cruel and unusual at common law. See Lackey v. Texas, 115 S.Ct. 1421 (1995) (memoradum of Justice Stevens respecting the denial of certioari); Elledge v. Florida, 119 S.Ct. 366 (1998) (Breyer, J., dissenting). Moreover, to execute someone after holding him for more than two decades in the agonizing suspense and close confinement reserved for those who are about to die is an inhuman, degrading punishment, and a denial of the fundamental human dignity that the Eighth Amendment is intended to safeguard. Where, as here, the delay is the result of the state's initial failure to give the defendant the constitutional hearing to which he was entitled, it cannot be considered incidental to the processing of appeals. It is unnecessary and thus unconstitutional.

Despite the hope expressed by Justice Stevens several years ago, Lackey, 115 S.Ct. at 1421, the lower federal courts have not served as "laboratories" to further study this issue,

and instead have foreclosed relief on procedural grounds. This case presents no procedural obstacles to ruling on the merits: The claim was clearly raised in the trial court and on direct appeal, and is here on petition for writ of certiorari after direct appeal. The issue remains substantial and important, and should be resolved.

B. Execution After Long Delay Does Not Serve the Constitutionally-Permissible Purposes of Capital Punishment and Is Contrary to the Intent of the Framers.

This Court's decision in Gregg v. Georgia, 428 U.S. 153 (1976), holding that a sentence of death for the crime of murder is not a per se violation of the Eighth and Fourteenth Amendments, was based largely on the grounds that the death penalty was considered permissible by the Framers, and might serve the purposes of retribution and deterrence. Id. at 177, 183; Lackey, 115 S.Ct. at 1421. Neither ground justifies the execution of a person originally convicted and condemned to die over two decades ago.

Execution of the death penalty when it no longer realistically furthers the legitimate penological purposes it is deemed to serve, would be a "pointless and needless extinction of life" and, therefore, "patently excessive and cruel and unusual punishment violative of the Eighth Amendment." Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring). As Justice White reasoned in Furman:

> The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is

> whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.

408 U.S. at 312-13. See also Gregg, 428 U.S. at 183 (joint opinion of Stewart, Powell, & Stevens, JJ.) ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality) (under Gregg, a punishment is excessive and unconstitutional if it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering").

This Court has recognized that the two constitutionally legitimate purposes justifying capital punishment are retribution and deterrence. Gregg, 428 U.S. at 183. Both of those purposes have already been satisfied by the twenty-four years Mr. Muhammad has been held in close confinement, alternating between hope and despair at the prospect of his eventual execution; and neither of those purposes would be measurably served by the additional step of executing him nearly a generation after his conviction. Execution after a delay of this magnitude would be a pointless and needless extinction of life which would not serve the constitutionally-legitimate purposes of capital punishment, and accordingly would constitute a patently excessive and cruel and unusual punishment violative of the Eighth Amendment. See Lackey, 115 S.Ct. at 1421-22 (execution after 17-year delay would arguably violate

Eighth Amendment because purposes of retribution and deterrence would arguably not be served); Elledge, 119 S.Ct. at (Breyer, J., dissenting) ("After such a delay, an execution may well cease to serve the legitimate penological purposes that otherwise provide a necessary constitutional justification for the death penalty.").

The additional deterrent effect of executing Mr. Muhammad now, or at any time in the future, compared to a sentence of twenty-four years on death row followed by continued incarceration for life, would be minimal at best. See Lackey, 115 S.Ct. at 1421-22 ("[T]he additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal."); Coleman v. Balkcom, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari) ("The deterrent value of any punishment is, of course, related to the promptness with which it is inflicted. . . . [T]he deterrent value of incarceration during that period of uncertainty [on death row] may well be comparable to the consequences of the ultimate step itself.").

The need to exact retribution has already been satisfied by the twenty-four years Mr. Muhammad has spent on death row. See Lackey, 115 S.Ct. at 1421 (Stevens, J.) (after 17 years on death row, "the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted").

Moreover, execution after such protracted delay would not serve the purpose of legitimate retribution. In Gregg, 428 U.S. at 183, this Court explained that retribution is a

constitutionally-permissible reason for applying the death penalty because the "expression of society's moral outrage at particularly offensive conduct" is an essential function "in an ordered society that asks its citizens to rely on legal processes rather than self help to vindicate their wrongs," quoting with approval the following observations of Justice Stewart:

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy -- of self-help, vigilante justice, and lynch law.

Furman, 408 U.S. at 308 (Stewart, J., concurring).

The need to avoid sowing the "seeds of anarchy," 408 U.S. at 308, cannot reasonably justify executing someone nearly a generation after he was convicted and sentenced to die. So belated an expression of outrage could not possibly serve to dissuade from the path of dissolution a society disposed to self-help, vigilante justice, and lynch law. See Coleman, 451 U.S. at 960 (Rehnquist, J., dissenting from denial of certiorari) ("[t]here can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution.").

At this point, execution would be nothing more than a gratuitous display of brutality, serving to exact, not retribution, but merely vengeance, in violation of the Eighth Amendment. See Ford v. Wainwright, 477 U.S. 399, 410 (1987) (Eighth Amendment

protects "the dignity of society itself from the barbarity of exacting mindless vengeance"); see also Blackstone's Commentaries on the Laws of England (1769), Book IV, Chapter 32, page 397 (a delayed execution "affects the minds of the spectators rather as a terrible sight, than as the necessary consequence of transgression").

The execution of a condemned prisoner after inordinate delay attributable to state actors not only fails to serve any constitutionally-permissible purpose of capital punishment, it is also contrary to the intent of the Framers. As Justice Stevens observed, it cannot be justified by reference to the practice of 1789, when such delays seldom, if ever, occurred. Lackey, 115 S.Ct. at 1421; see also Pratt & Morgan v. Attorney General for Jamaica, 2 AC 1, 4 All ER 769, 773, (Privy Council 1993) (en banc) ("The death penalty in the United Kingdom has always been carried out expeditiously after sentence, within a matter of weeks or in the event of an appeal even to the House of Lords within a matter of months. Delays in terms of years are unheard of.") (emphasis added); id., 4 All ER at 775 (noting the "common law practice that execution followed as swiftly as practical after sentence").

"There is no doubt" that Section 10 of the English Bill of Rights of 1689 "is the antecedent of the cruel-and-unusual punishment clause of our Eighth Amendment." Harmelin v. Michigan, 501 U.S. 957, 966 (1991) (opinion of Scalia, J.); Elledge, 119 S.Ct. at 366 (Breyer, J., dissenting from denial of certiorari).

And, as this Court has long held, the content of English criminal jurisprudence in the eighteenth century is directly relevant to determining what the framers of our constitution

and Bill of Rights intended in drafting the various provisions. See Ex parte Grossman, 267 U.S. 87, 108-9 (1925) ("The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."); Kepner v. United States, 195 U.S. 100, 125-26 (1904) ("In ascertaining the meaning of the phrase taken from the Bill of Rights it must be construed with reference to the common law from which it was taken."); Ex parte Wells, 59 U.S. 307, 311 (1856) (the word "pardon" must be given "the same meaning as prevailed here and in England at the time it found a place in the Constitution").

There can also be no doubt that prolonged incarceration under sentence of death would have been considered cruel and unusual at English common law, and, had it occurred, would have been remedied by commutation of the sentence to imprisonment. See Pratt, 4 All ER at 774. In Pratt, the Privy Council surveyed the history of English common law regarding the subject of lengthy imprisonment before execution, and concluded that this practice was not condoned at common law, stating:

> It is difficult to envisage any circumstance in which in England a condemned man would have been kept in prison for years awaiting execution. But if such a situation had been brought to the attention of the court their Lordships do not doubt that the judges would have stayed the execution to enable the prerogative of mercy to be exercised and the sentence commuted to one of life imprisonment.

Pratt & Morgan, 4All ER at 774. See also Riley v. Attorney General of Jamaica, 1 AC 719, 734-35, 3 All ER 469, 480-81 (Privy Council 1983) (Lord Scarman, dissenting, joined by

Lord Brightman) (arguing that "execution after inordinate delay would have infringed the prohibition against cruel and unusual punishment to be found in Section 10 of the Bill of Rights of 1689," and concluding that "the jurisprudence of the civilised world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognised and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading").

C. Execution Nearly a Generation After the Prisoner's Original Conviction and Sentence of Death is Cruel, Degrading, and a Violation of the Human Dignity the Eighth Amendment is Intended to Safeguard.

Mr. Muhammad has been on death row for more than twenty-four years. When he was originally sentenced to death he was twenty-four years old. He is now forty eight. He has spent half of his entire life, and nearly all his adult life, in the close confinement reserved for those condemned to die. Death-row inmates in Florida are kept in small cells "two paces wide and three paces deep." David Von Drehle, Among the Lowest of the Dead (1995), 126. They are not given employment and are kept in their cells. They are allowed only two hours per week in the "yard." (T. 2256). For twelve years Mr. Muhammad was denied even this. He was held in a special isolation cell in what is now known as X Wing. There the cells are smaller and the isolation is total. (T. 2297). The prisoner can neither see nor hear anything outside his cell. There are no windows; the door is solid steel. There is no televison, nothing to read but the legal materials of the inmate's own case, no yard privileges, no air

conditioning and no breeze. (T. 2296, 3536, 3547); see Meg Laughlin, Locked Alone in X Wing, The Miami Herald, May 30, 1999, at 1L to 3L (describing conditions on X Wing). X Wing is where the electric chair is located, and Mr. Muhammad will be held there again for a month before his execution. Id. at 3L.[3]

During the time that Mr. Muhammad has been on death row, Florida has electrocuted forty-three persons at Florida State Prison. The threat of execution is very real, and can only become more so with each passing year. As Mr. Muhammad stated to the judge:

> For the last 22 years I have been on death row. Thirty-seven people have been executed while I have been on death row so I know it's no joke. It's no show. It's no game for me. This is serious. I know it's serious.

(T. 365). The focus on death is pervasive. The condemned know in detail the manner in which they will die. Execution procedure is a "staple" of conversation on Florida's death row. Von Drehle at 289 ("[T]he vision of their final moments is one they rehearse over and over in their minds. . . . They experience it again and again and again, in daydreams and nightmares, and they alter every variable, ponder every option."). To be kept for decades in such a state, with the mind focused on death, not knowing whether to hope or despair,

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[3]The purpose, according to the article, is to ensure a quiet execution:

> David Lehr, a former FSP assistant superintendant, . . . explained that Death Row inmates are put on X Wing a month before their scheduled execution to complete the process of breaking them down before they are strapped into the electric chair. "This way, they go quietly," he said.

Id.

neither adjusting to life nor preparing for death, is to be deprived of any human existence.

The Eighth Amendment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity and decency'" against which forms of punishment must be measured. Estelle v. Gamble, 429 U.S. 97, 102 (1976) (citation omitted). It stands to safeguard "nothing less than the dignity of man," Trop v. Dulles, 356 U.S. 86, 100 (1958), and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," id. at 101. As the concepts of dignity and civility evolve, so too do the limits of what is considered cruel and unusual. Such concepts of dignity and civility include international practices. See, e.g., Stanford v. Kentucky, 492 U.S. 361, 369 (1989); Coker v. Georgia, 433 U.S. 584 (1977); Enmund v. Florida, 458 U.S. 782 (1982).

To execute someone after keeping him isolated in a small cell for more than two decades, in conditions designed for those who are soon to die, with nothing to do but agonize about his fate, is not only cruel, it is degrading, inhuman, and a violation of the fundamental human dignity that the Eighth Amendment stands to protect. Such prolonged incarceration under the shadow of impending execution (which may or may not come) constitutes additional punishment, far beyond the "mere extinguishment of life" inherent in a death sentence, and is cruel both in a dictionary and a constitutional sense. See In re Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve . . . a lingering death . . . something more than the mere extinguishment of life.").

While close confinement and mental anguish at the prospect of a violent, humiliating

death may be inevitable concomitants of the death penalty, the prolongation of these conditions for decades is not. This is a new punishment, different in kind from the "short but awful" interval between sentence and execution experienced by the condemned prisoner in Blackstone's day. Blackstone's Commentaries, Book IV, Chapter 14, page 202. This Court recognized over a century ago that the pain and mental anxiety caused by near-solitary confinement and uncertainty as to when the execution will take place are constitutionally-significant additions to the punishment inflicted on a person condemned to death. See In re Medley, 134 U.S. 160 (1890) (setting free a state prisoner condemned to death because solitary confinement and a secret time of execution were additional punishments which violated the constitution's prohibition of ex post facto laws). This Court explained that solitary confinement in "a place where imprisonment always implies disgrace," 134 U.S. at 169, was "an additional punishment of the most important and painful character," id. at 171, and that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place." Id. at 172. The prisoner's uncertainty as to the time execution "must be accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment." Id. at 172.

As Justice Stevens observed in Lackey, if the Court accurately described the effect of uncertainty in Medley, which involved a period of four weeks, "that description should

apply with even greater force in the case of delays that last for many years." Lackey, 115 S.Ct. at 1421. The inherent torturousness and cruelty of a prolonged stay on death row has been recognized by numerous jurists and legal commentators. E.g., Coleman, 451 U.S. at 952 (Stevens, J., concurring in denial of certiorari) (the mental pain suffered by a condemned prisoner awaiting execution is "a significant form of punishment" that "may well be comparable to the consequences of the ultimate step itself"); Sullivan v. Wainwright, 464 U.S. 109, 112 (1983) (Burger, C.J., concurring) ("The argument so often advanced by the dissenters that capital punishment is cruel and unusual is dwarfed by the cruelty of 10 years on death row inflicted upon this guilty defendant by his lawyers seeking to turn the administration of justice into the sporting contest that Roscoe Pound denounced three-quarters of a century ago."); Furman, 408 U.S. at 288-89 (Brennan, J., concurring) ("[W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution extracts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death"); People v. Anderson, 493 P.2d 880 (Cal. 1972) ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to the execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the [protracted] process of carrying out a verdict of death is often so degrading and

brutalizing to the human spirit as to constitute psychological torture.").[4]

Medley involved the prohibition of ex post facto laws, rather than the Eighth Amendment, which at that time did not apply to the states. However, since Medley was decided, the cruel and unusual punishments clause of the Eighth Amendment has been held applicable to the states, Robinson v. California, 370 U.S. 660 (1962), and it has been recognized that the infliction of extreme mental anguish can be a form of unconstitutional torture, see, e.g., Trop v. Dulles, 356 U.S. at 102 (expatriation as penalty for desertion "subjects the individual to a fate of ever increasing fear and distress"); Hudson v. McMillan, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) ("I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes [under the Eighth Amendment]. If anything, our precedent is to the contrary."); Furman, 408 U.S. at 271-72 (Brennan, J., concurring) ("[T]he Framers also knew 'that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation.'"), quoting Weems v. United States, 217 U.S. 349,372 (1910).

Evolving concepts of civility and dignity, including international practices, require the conclusion that execution after two decades on death row is cruel and unusual

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[4]See also Suffolk County District Attorney v. Watson, 411 N.E.2d 1274, 1289-95 (Mass. 1980) (Liacos, J., concurring) (describing the psychological pain and torture that the condemned person experiences while awaiting execution); id. at 1287 (Braucher, J., concurring) (arguing that capital punishment is unconstitutional under Massachusetts Constitution in part because "it will be carried out only after agonizing months and years of uncertainty").

punishment violative of the Eighth Amendment. As Lords Scarman and Brightman observed sixteen years ago, "[i]t is no exaggeration . . . to say that the jurisprudence of the civilised world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognised and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading." Riley v. Attorney General of Jamaica, 1 AC 719, 3 All ER 469 (Privy Council 1983) (Lord Scarman, dissenting, joined by Lord Brightman). That statement is even truer today. See Pratt, 4 All ER at 784-87 (discussing cases and concluding that to execute a prisoner after holding him on death row for fourteen years constitutes "torture," and "inhuman" and "degrading" punishment, within the meaning of section 17(1) of Jamaica's constitution); Soering v. United Kingdom, 11 Eur. Hum. Rts. Rep. 439 (1989) (European Court of Human Rights refused to extradite a German national from the UK to Virginia to face capital murder charges because anticipated time that he would have to spend on death row if sentenced to death would constitute torture or inhuman or degrading treatment or punishment within the meaning of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms); Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General, No. S.C. 73/93 (Zimbabwe, 1993) (reported in 14 Hum.Rts.L.J. 323 (1993) (vacating death sentences because execution after inordinate delay would contravene constitutional provision that "[no] person shall be subjected to torture or to inhuman or degrading punishment or other such treatment").

These decisions do not rest simply on the suffering inflicted by prolonged incarceration awaiting execution. No one argues that execution must take place immediately after sentencing; it is generally recognized that there must be a reasonable time for appeal. At some point, however, there must be a resolution, and "[i]n the last resort the courts have to accept the responsibility of saying whether the threshold has been passed in any given case," rendering further incarceration under sentence of death, or execution, no longer acceptable. Pratt, 4 All ER at 787.

In 1993, the Privy Council of the United Kingdom held, in a unanimous, en banc decision, that to execute a prisoner after holding him on Jamaica's death row for fourteen years constitutes "torture," and "inhuman" and "degrading" punishment, within the meaning of section 17(1) of Jamaica's constitution. Although it had no difficulty concluding that the men had suffered great anguish of mind, or that execution after holding them in an agony of suspense for so many years would be an inhuman act,[5] the Privy Council also recognized

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[5]The prisoners had been on death row for fourteen years, and on three occasions death warrants had been read to them and they had been removed "to the condemned cells immediately adjacent to the gallows." The Privy Council observed:

> The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope and despair in the 14 years that they have been in prison facing the gallows. It is unnecessary to refer to the evidence describing the restrictive conditions of imprisonment and the emotional and psychological impact of this experience, for it only reveals that which is to be expected.

that there must be a "reasonable" time for appeal, and that delay "due entirely to the fault of the accused such as an escape from custody or frivolous and time wasting resort to legal procedures which amount to an abuse of process" should not preclude execution, since the accused cannot be permitted to use "illegitimate means to escape the punishment inflicted upon him in the interest of protecting society against crime," Pratt, 4 All ER at 784. The difficult question was:

> whether the delay occasioned by the legitimate resort of the accused to all available appellate procedures should be taken into account, or whether it is only delay that can be attributed to the shortcomings of the state that should be taken into account.

Id.

To decide this question, the Privy Council reviewed its own past decisions, as well as decisions of other nations, and of the European Court of Human Rights. In particular, it considered the view, which it believed prevailed in some states of the United States, that "it cannot be inhuman or degrading to allow an accused every opportunity to prolong his life by resort to appellate procedures however extended may be the eventual time between

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4 All ER at 772. It further observed that,

> There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity: we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.

4 All ER at 784.

sentence and execution." Pratt, 4 All ER at 784. It concluded that execution must follow "as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve" and that a delay of almost fourteen years was "wholly unacceptable." Id. at 787. As stated by the Privy Council:

> To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman punishment within the meaning of s 17(1) [of Jamaica's Constitution]. In the last resort the courts have to accept the responsibility of saying whether the threshold has been passed in any given case and there may be difficult borderline decisions to be made. This, however, is not a borderline case. The [14-year] delay in this case is wholly unacceptable and this appeal must be allowed.

Pratt, 4 All ER at 787.

In the United States, the issue remains a substantial, unresolved question, as Justices Stevens and Breyer pointed out in Lackey four years ago. In Lackey, Justice Stevens observed that the question of whether executing a prisoner after prolonged incarceration on death row violates the Eighth Amendment was novel, important, and "not without foundation," 115 S.Ct. at 1421, but concluded that in view of the claim's "legal complexity and potential for far-reaching consequences," it should receive further study in the "laboratories" of the state and federal courts. Id. at 1422.

Contrary to the hope of Justice Stevens the lower federal courts have not served as a laboratory to further study this issue. Over the strenuous dissents of several judges, the federal courts have generally refused to consider the question on its merits, foreclosing relief

on procedural grounds, such as abuse of the writ or on the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). E.g., White v. Johnson, 79 F.3d 432 (5th Cir. 1996); Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir. 1995); Turner v. Jabe, 58 F.3d 924, 926 (4th Cir. 1995); Porter v. Singletary, 49 F. 3d 1483, 1485 (11th Cir. 1995); McKenzie v. Day, 57 F.3d 1461, 1463 (9th Cir. 1995), superseded en banc as McKenzie v. Day, 57 F. 3d 1493 (9th Cir. 1995); Ceja v. Stewart, 134 F.3d 1368 (9th Cir. 1998).

The state courts have generally taken the position, as the Florida Supreme Court did here, that, given the absence of a federal decision to the contrary, execution after prolonged incarceration under sentence of death cannot be unconstitutional, so long as the delay is due to appellate procedures, rather than a deliberate scheme to torture inmates. State v. Schackart, 947 P.2d 315 (Ariz. 1997); State v. Smith, 931 P.2d 1272 (Mont. 1996); Bell v. State, 938 S.W.2d 35 (Tex. Crim. App. 1996); Hill v. State, 962 S.W.2d 762 (Ark. 1998); Stafford v. State, 899 P.2d 657 (Okla. 1995); Bush v. State, 695 So. 2d 138 (Ala. 1997). The federal dicta upon which these decisions rely reflects a misunderstanding of the claim. See McKenzie, 57 F.3d at 1484-89 (Norris, J., dissenting); Ceja, 134 F.3d at 1369-78 (Fletcher, J., dissenting). Smith, 931 P.2d at 1291-92 (Leaphart, J., specially concurring). In particular, the suggestion that a death row inmate cannot complain of any delay unless he foregoes the opportunity to question the constitutionality of his conviction and death sentence, and insists on quick execution, "gives new meaning to the notion of 'mockery of justice.'" McKenzie, 57 F. 3d at 1489 (Norris, J., dissenting).

Where, as here, the inherent cruelty of living under a sentence of death is prolonged for more than two decades, because of the state's initial failure to give the prisoner the constitutional sentencing hearing to which he was entitled, such suffering cannot be considered incidental to the processing of the appeals. It is unnecessary and thus unconstitutional. See Elledge, 119 S.Ct. at 366-67 (Stevens, J., dissenting from denial of certiorari) (execution after delay of nearly a generation because of the state's own faulty procedures may be particularly cruel); Smith, 931 P.2d at 1291 (Leaphart, J., specially concurring) (when a defendant is successful in his appeals, serious questions are raised "as to how long a defendant can be expected to languish on death row while the State and the trial courts are afforded repeated opportunities to comply with due process"). Such long-term suffering becomes a separate form of punishment, which is equivalent to or greater than an actual execution. See Coleman, 451 U.S. at 952 (Stevens, J., concurring in denial of certiorari). As a result of the inordinate delay, death cannot be added to the punishment; the only permissible punishment under the Eighth Amendment is life imprisonment.

This case presents no procedural obstacles to ruling on the merits. The claim was clearly raised in the trial court and on direct appeal, and is here on petition for writ of certiorari after direct appeal. This Court should grant the petition for writ of certiorari to decide this important, unresolved issue.

II.

IMPOSITION OF THE DEATH PENALTY THROUGH THE RETROSPECTIVE APPLICATION OF A STATUTORY AGGRAVATING FACTOR ENACTED AFTER THE COMMISSION OF THE CRIMES VIOLATED THE PROHIBITION AGAINST EX POST FACTO PUNISHMENTS OF ARTICLE I, § 10 OF THE UNITED STATES CONSTITUTION.

In February 1996, after a new sentencing hearing, Mr. Muhammad was sentenced to death for murders committed in July 1974. Among the statutory aggravating circumstances submitted to the jury, and relied upon by the judge in sentencing Mr. Muhammad to death, was the circumstance that "[t]he capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification," § 921.141(5)(i), Fla. Stat. (1995). This aggravating circumstance (referred to as "CCP") "encompasses something more than premeditated first-degree murder." Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). The Florida Supreme Court has summarized its meaning as follows:

> [I]n order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), * * *; *and* that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), * * *; *and* that the defendant exhibit heightened premeditation (premeditated), * * *; *and* that the defendant had no pretense of moral or legal justification. * * *

Jackson, 648 So. 2d at 89 (citations omitted) (original emphasis).

The CCP aggravator was added to Florida's death penalty statute in 1979, five years after the offenses for which Mr. Muhammad was sentenced to death. Chapter 79-353, Laws of Florida. In the trial court and on appeal, Mr. Muhammad asserted that its application to the crimes committed in 1974 was a violation of the constitutional prohibition of ex post facto laws. The Florida Supreme Court rejected this argument, based on its decision in Combs v. State, 403 So. 2d 418 (Fla. 1981), cert. denied, 465 U.S. 1052 (1984), where it held that in enacting CCP the legislature had not added an "entirely new" factor as an aggravating circumstance, but had only "reiterate[d] in part what is already present in the elements of premeditated murder," with "limitations which inure to the benefit of a defendant," Combs, 403 So. 2d at 421. The state supreme court's analysis is incompatible with the decisions of this Court interpreting the requirements of the Ex Post Facto Clause.

A change in sentencing law violates the Constitution's prohibition against ex post facto punishments "if it is both retrospective and more onerous than the law in effect on the date of the offense." Weaver v. Graham, 450 U.S. 24, 30 (1981). To fall within the ex post facto prohibition, a law must not only "apply to events occurring before its enactment," it "must disadvantage the offender affected by it," by altering the definition of criminal conduct or increasing the punishment for the crime. Lynce v. Mathis, 117 S. Ct. 891, 896 (1997), quoting Weaver, 450 U.S. at 29, and citing Collins v. Youngblood, 497 U.S. 37, 50 (1990); accord Miller v. Florida, 482 U.S. 423, 430 (1987). Moreover, no ex post facto violation occurs from changes which are procedural and do not affect matters of substance. Dobbert

v. Florida, 432 U.S. 282, 293 (1977). "Whether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question." Weaver, 450 U.S. at 33. "The inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual." Id.

"Weaver and Miller held that the Ex Post Facto Clause forbids the States to enhance the measure of punishment by altering the substantive 'formula' used to calculate the applicable sentencing range." California Dept. of Corrections v. Morales, 514 U.S. 499, 505 (1995). The statute at issue in Miller established "presumptive sentencing ranges" for various offenses, which judges were required to follow in the absence of clear and convincing reasons for a departure. The legislature enacted a revised guidelines law which, by increasing the number of points assigned to the crimes of conviction, effected an increase in the presumptive sentencing range. This Court unanimously held that retrospective application of the revised guidelines violated the Ex Post Facto Clause, because the change substantially disadvantaged those affected by it and was not procedural: The increase in points did not alter the method to be followed in determining the appropriate sentence, "it simply insert[ed] a larger number into the same equation," thereby increasing the "quantum of punishment" for that category of crimes. Id., 482 U.S. at 433-34.

Like the revision of the sentencing guidelines considered in Miller, the addition of the CCP aggravating circumstance to Florida's death penalty statute enhances the measure of punishment by altering the "substantive formula" used to determine the applicable sentence,

and, therefore its retrospective application to crimes committed before its enactment violates the prohibition against ex post facto punishments.

Florida's death penalty statute requires the jury to determine whether "sufficient aggravating circumstances exist," whether "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist," and "[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." § 921.141(2), Fla. Stat. (1995); § 921.141(2), Fla. Stat. (1973). If a majority of the jury recommends death, the judge, too, must make these determinations. § 921.141(3), Fla. Stat. (1995); § 921.141(3), Fla. Stat. (1973).

The only aggravating circumstances which can be considered are those set forth in the statute. § 921.141(5), Fla. Stat. (1995) ("Aggravating circumstances shall be limited to the following . . ."); § 921.141(5), Fla. Stat. (1973) (same); Purdy v. State, 343 So. 2d 4, 6 (Fla. 1977) ("The specified statutory circumstances are exclusive; no others may be used for that purpose."); Miller v. State, 373 So. 2d 882, 885 (Fla. 1979) (same); Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988) (same).

Moreover, the death penalty cannot be imposed unless at least one of the statutory aggravating circumstances is properly found. Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) ("a defendant cannot be executed in the absence of aggravating factors"); Banda v. State, 536 So. 2d 221, 225 (Fla. 1988) ("The death penalty is not permissible under the law of Florida where, as here, no valid [statutory] aggravating factors exist."). Even if convicted

of first-degree, premeditated murder, a person is not eligible for the death penalty in the absence of a statutory aggravating circumstance. See Richardson, 604 So. 2d at 1109 (reducing death sentence to life imprisonment because, although there was sufficient evidence that the murder was calculated, it was not "cold," and thus CCP did not apply, and, since the other aggravator found by the judge also did not apply, the defendant could not be executed); Banda, 536 So. 2d at 225 (although cold and calculated, the murder was not CCP, which was the only aggravator found by the judge, and therefore the death sentence had to be replaced by a sentence of life in prison).

Thus, as the Florida Supreme Court has repeatedly held, the statutory aggravating circumstances, when read with the statutes defining capital crimes, "actually define those crimes . . . to which the death penalty is applicable." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); Combs, 403 So. 2d at 421.

Under such a capital sentencing statute, the enactment of a new aggravating circumstance necessarily alters the "substantive formula" used to determine the applicable sentence, and substantially disadvantages those affected by the change. The addition of an aggravating circumstance to the statutory list renders eligible for the death penalty persons who were not so before and, even in those cases where other aggravating circumstances apply, increases the risk that a death sentence will be recommended by the jury and imposed by the sentencing judge, since there is now an additional factor to be weighed against any mitigating circumstances. Such a change in the standard used to choose between life and

death is substantive and detrimental and therefore its retrospective application violates the prohibition against ex post facto laws. See Miller, 482 U.S. at 431-36 (change in presumptive guidelines sentencing range was not procedural, clearly disadvantaged those affected by it, and its retrospective application was an ex post facto violation); Bowen v. State, 911 S.W.2d 555, 563-64 (Ark. 1995) (concluding, based on Miller, that retrospective application of a statutory aggravating circumstance was an ex post facto violation, because, as standards guiding selection of the punishment, such statutory provisions are substantive, not merely procedural, and although adding an aggravator "does not guarantee the harsher sentence, it may have a direct effect on the decision and thus result in a harsher sentence than might have been imposed were that aggravating circumstance not present"); State v. Jordan, 440 So. 2d 716, 718 (La. 1983) (addition of aggravating circumstance was a substantive change in the law, and its application to defendant was an ex post facto violation because, assuming arguendo that other aggravators did not apply, he was now exposed to the death penalty whereas at the time of the murder he was not so exposed); State v. Correll, 715 P.2d 721, 734-35 (Ariz. 1986) (addition of aggravating circumstance, which was one of three found by the trial court, was a substantive, not a procedural, change, and since it "obviously" disadvantaged defendant was an ex post facto law); see also Trotter v. State, 690 So. 2d 1234, 1238 (Fla. 1997) (Anstead, J., dissenting) (redefining a death penalty crime by amending aggravating circumstance was obviously a "far more substantial change in the law" than the changes involved in Miller and Weaver).

The Supreme Court of Florida has recognized that the addition of statutory aggravators may constitute a substantive change in the law of capital punishment, and that retrospective application may be prohibited by the Ex Post Facto Clause. Hootman v. State, 709 So. 2d 1357, 1360 (Fla. 1998) (aggravating circumstance that "[t]he victim of the capital felony was particularly vulnerable due to advanced age or disability" could not be applied retrospectively because it was an "entirely new" aggravator, which changed the substantive law of capital punishment and disadvantaged the defendant "by altering the definition of the criminal conduct and increasing the punishment of a crime"), receded from on other grounds in State v. Matute, 713 So. 2d 1006 (Fla. 1998). However, only the addition of aggravators it deems to be "entirely" new is considered to effect a "substantial" change in the law whose retrospective application would violate the Ex Post Facto Clause. See Hootman, 709 So. 2d at 1360; Trotter, 690 So. 2d at 1237 (finding no ex post facto violation in retrospective application of amended aggravator, which in its unamended form had been held inapplicable in defendant's case, "just as we have found no violation in every other case where an aggravating circumstance was applied retroactively," because the extension of the aggravator's scope to encompass the circumstances of defendant's case was merely a "refinement" of the law, not a substantive change).

In Combs, the Florida Supreme Court held that application of the CCP aggravator to a crime which occurred before that aggravator was enacted did not violate the prohibition against ex post facto laws, explaining that the legislature had not added an "entirely new"

factor as an aggravating circumstance, but had only "reiterate[d] in part what is already present in the elements of premeditated murder," with "limitations which inure to the benefit of a defendant." Combs, 403 So. 2d at 421. As stated by the Florida Supreme Court:

> What, then, does paragraph (i) [establishing the CCP aggravator] add to the statute? In our view, it adds the requirement that in order to consider the elements of a premeditated murder as an aggravating circumstance, the premeditation must have been "cold, calculated and . . . without any pretense of moral or legal justification." Paragraph (i) in effect adds nothing new to the elements of the crimes for which petitioner stands convicted but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant.

Combs, 403 So. 2d at 421.

This "peculiar position" is "simply untenable," Justus v. Florida, 465 U.S. 1052, 1054 (1984) (Marshall, joined by Brennan, JJ., dissenting from denial of certiorari), and cannot survive the analysis required by this Court's decision in Miller, see Ellis v. State, 622 So. 2d 991, 1002 (Fla. 1993) (Kogan, J., concurring) (Miller renders unconstitutional a retroactive application of the CCP aggravator).

The cold, calculated or premeditated aggravating circumstance is not merely a restatement of an element of the crime of first-degree murder, nor a reiteration of an existing aggravating circumstance. The elements of premeditated murder, unlike the statutory aggravating circumstances, did not give rise to a presumption that death is the proper sentence. See Dixon, 283 So. 2d at 9. And, before the addition of the CCP aggravator,

neither the judge nor the jury could consider in aggravation the fact that the murder was "the product of cool and calm reflection," or that it was carefully planned, or that the defendant exhibited "heightened premeditation" and had "no pretense of moral or legal justification," because those circumstances, which are included under CCP, Jackson, 648 So. 2d at 89, were not in the exclusive list of aggravating circumstances which the judge and the jury were required to weigh against whatever mitigation might be present. See Purdy, 343 So. 2d at 6 ("The specified statutory circumstances are exclusive; no others may be used for that purpose."); Miller, 373 So. 2d at 885 (same); Grossman, 525 So. 2d at 842 (same).

Enactment of the CCP aggravator did not place "limitations" on an existing aggravating circumstance, it expanded the circumstances in which the death penalty could be considered presumptively appropriate. It rendered eligible for the death penalty persons who were not so before, and increased the risk that others would be sentenced to death. Like the revision of the guidelines considered in Miller, such a change, whether or not it is "entirely" new, is substantive, not procedural, and cannot be considered ameliorative. See Bowen, 911 S.W. 2d at 563-64; Jordan, 440 So. 2d at 718; Correll, 715 P.2d at 734-35; Ellis, 622 So. 2d at 1002 (Kogan, J., concurring); Trotter, 690 So. 2d at 1238 (Anstead, J., dissenting); see also Combs, 403 So. 2d at 422 (Sundberg, C.J, concurring in part and dissenting in part, joined by England and McDonald, JJ.) ("I must confess that it is beyond my powers of comprehension to understand how the majority can seriously contend that the addition of subsection (i) as an aggravating circumstance "inure[s] to the benefit of a

defendant.").

By altering the substantive formula used to determine whether a death sentence should be imposed, this change increased the quantum of punishment. The legislature has not only "inserted a larger number into the same equation," see Miller, 482 U.S. at 433, it has changed the equation itself, see Justus, 465 U.S. at 1054 (Marshall, joined by Brennan, JJ., dissenting from denial of certiorari) ("By amending its death penalty statute [to add CCP], Florida changed the ground rules for judging the totality of the circumstances."). In the present case, application of this new aggravator, to which the sentencing judge gave "great weight" (R. 528), "made it easier for the Florida judge to sentence petitioner to death, and for that reason alone was more onerous for petitioner than the sentencing procedure in place at the date of his offense." Justus, 465 U.S. at 1054. The Florida Supreme Court's conclusion that no ex post facto violation occurred, and its analysis of the requirements of the Clause in this context, is clearly contrary to the decisions of this Court.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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June 9, 1999

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No. 98-9741 (3)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

THOMAS KNIGHT,
N/K/A ASKARI ABDULLAH MUHAMMAD,

Petitioner,

-vs-

FLORIDA,

Respondent.

APPENDIX

Opinion of the Supreme Court of Florida, reported in Knight v. State, 721 So. 2d 287 (Fla. 1998) A1-16

Order of the Supreme Court of Florida denying rehearing A17

Revised opinion of the Supreme Court of Florida A18-38

41 pp

HARDING, C.J., and OVERTON, SHAW, KOGAN, WELLS, ANSTEAD and PARIENTE, JJ., concur.

HARDING, C.J., and OVERTON, SHAW, KOGAN, WELLS and PARIENTE, JJ., concur.

ANSTEAD, J., dissents.

1

STATE of Florida, Petitioner,

v.

Jason Edwaurd THOMPSON, Respondent.

No. 92435.

Supreme Court of Florida.

Oct. 29, 1998.

Application for Review of the Decision of the District Court of Appeal—Certified Great Public Importance Fourth District—Case No. 97-0164 (Indian River County).

Robert A. Butterworth, Attorney General, Celia A. Terenzio, Assistant Attorney General, Chief, West Palm Beach Bureau, and Melynda L. Melear, Assistant Attorney General, West Palm Beach, for Petitioner.

Richard L. Jorandby, Public Defender, and Paul E. Petillo and Anthony Calvello, Assistant Public Defenders, Fifteenth Judicial Circuit, West Palm Beach, for Respondent.

PER CURIAM.

We originally accepted jurisdiction to review *Thompson v. State*, 708 So.2d 289 (Fla. 4th DCA 1998), pursuant to article V, section 3(b)(4), of the Florida Constitution. After further consideration, we have determined that jurisdiction was improvidently granted.

Accordingly, this case is hereby dismissed.

It is so ordered.

2

Thomas KNIGHT, n/k/a Askari Abdullah Muhammad, Appellant,

v.

STATE of Florida, Appellee.

No. 87,783.

Supreme Court of Florida.

Nov. 12, 1998.

After defendant's sentences of death for two murders were remanded from federal court, 863 F.2d 705, the Circuit Court, Dade County, Rodolfo Sorondo, Jr., J., again sentenced defendant to death. Defendant appealed. The Supreme Court held that: (1) trial court acted within its discretion in refusing to exclude testifying detective from courtroom throughout sentencing proceeding; (2) defendant was not prejudiced by trial court's explanation regarding defendant's daily removal from courtroom for unruly behavior; (3) trial court acted within its discretion in removing three jurors who heard improper remarks by courthouse employee; (4) evidence supported finding of five aggravators; and (5) death sentences were not disproportionate.

Affirmed.

Harding, C.J., concurred specially and filed opinion in which Overton, J., joined.

Wells, J., concurred in part and dissented in part and filed opinion.

1. **Criminal Law ⇐1036.5**

Defendant was procedurally barred from claiming on appeal that detective's hearsay testimony violated defendant's right to confrontation, due process, and reliable sentencing proceeding, where defendant never specifically objected to detective's testifying as to contents of declarant's statement. U.S.C.A. Const.Amends. 6, 14.

2. **Criminal Law ⇐665(1)**

The purpose of the rule of sequestration is to avoid a witness coloring his or her testimony by hearing the testimony of another, thereby discouraging fabrication, inaccuracy, and collusion.

3. **Criminal Law ⇐665(2)**

In applying the exception to the rule of witness sequestration for a person whose presence is essential to the presentation of a party's cause, the trial court has wide discretion in determining which witnesses are essential. West's F.S.A. § 90.616(2)(c).

4. **Criminal Law ⇐665(1)**

In resentencing proceeding, trial court acted within its discretion in permitting detective to remain in courtroom during entire proceeding, even though detective was a fact witness; detective was testifying as to what others had testified to two decades earlier in original trial, or as to what others had stated in sworn statements, and detective's testimony was subject to being carefully checked by comparison to transcripts of trial testimony. West's F.S.A. § 90.616(2)(c).

5. **Criminal Law ⇐1042**

Murder defendant was barred on appeal from arguing that state impermissibly used his future dangerousness as a nonstatutory aggravating circumstance, where none of the alleged instances of alleged impropriety was objected to or argued to trial court.

6. **Criminal Law ⇐1037.1(1)**

Ordinarily, allegedly improper prosecutorial comments not constituting fundamental error are not cognizable on appeal absent a contemporaneous objection.

7. **Homicide ⇐357(6)**

A future dangerousness nonstatutory aggravating factor does not exist in Florida.

8. **Criminal Law ⇐1208 1/2**

The only matters that may be asserted in aggravation are those set out in the death penalty statute.

9. **Criminal Law ⇐1037.1(2)**

In sentencing phase of capital murder trial, prosecutor's "kill, and kill and kill again" comment did not impermissibly inject defendant's future dangerousness into the proceeding as an unlawful nonstatutory aggravating circumstance sufficiently to constitute fundamental error.

10. **Homicide ⇐358(1)**

In penalty phase of capital murder trial, jury was sufficiently apprised of consequences of a life recommendation by fact that defense counsel and trial judge informed jury that consecutive life sentences totaling a minimum mandatory of 50 years could be imposed.

11. **Criminal Law ⇐636(2)**

Trial court acted within its discretion in telling jury that proceedings were not started on time due to fact that defendant was regularly removed from courtroom because he "would not conform to accepted courtroom behavior"; defendant had every opportunity to remain in courtroom but chose to misbehave.

12. **Criminal Law ⇐1036.6**

Defendant was procedurally barred on appeal from raising claims that state improperly called court-appointed expert to testify during its rebuttal case, where defendant never raised specific grounds for objection before trial court.

13. **Criminal Law ⇐490**

Defense opened the door for state to present rebuttal testimony of court-appointed expert, by addressing issue of defendant's competence and by referencing expert's competency examination report itself.

14. **Criminal Law ⇐855(8)**

Trial court acted within its discretion in removing three jurors who heard improper commentary from courthouse employee relating to defendant's mental health problems.

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15. Criminal Law ⇐723(1)

In sentencing phase of capital murder trial, prosecutor's improper comments regarding value of defendant's life and victim's lives was not egregious enough to warrant voiding of entire proceeding.

16. Criminal Law ⇐986.2(4.1)

Previous violent felony convictions suffice for purposes of the prior violent felony aggravator so long as the convictions predate the sentencing, even when the crimes underlying the conviction occurred after the crime for which the defendant is being sentenced.

17. Criminal Law ⇐1173.2(4)

Trial court's refusal to instruct jury on merging of aggravators based on common aspect of offense, even if erroneous, was harmless, where each of the contemporaneous murders involved in case qualified as prior violent felony convictions.

18. Homicide ⇐358(3)

In capital murder trial, court sufficiently considered each of the relevant aggravators and mitigators and assigned proportional weight to each; court's lengthy sentencing order was a comprehensive evaluation of all of the salient weighing factors.

19. Homicide ⇐357(8)

To support a valid avoid arrest aggravator where the victim is not a law enforcement officer, the proof must demonstrate beyond a reasonable doubt that the victim was murdered solely or predominantly for the purpose of witness elimination.

20. Homicide ⇐357(8)

Evidence supported aggravator that defendant murdered victims for purpose of avoiding arrest; defendant killed victims execution-style after rambling journey to remote location.

21. Homicide ⇐357(11)

Evidence did not support aggravator that murder was especially heinous, atrocious, or cruel (HAC); there was no evidence in record as to what occurred during time that victims were abducted until time they were murdered.

22. Homicide ⇐343

Trial court's erroneous finding of heinous, atrocious, or cruel (HAC) aggravator was harmless in murder trial, where court found five other valid aggravators.

23. Homicide ⇐357(11)

Evidence supported aggravator that murders were cold, calculated, and premeditated (CCP); defendant's lengthy journey to final destination provided an abundance of time for defendant to coldly and calmly decide to kill.

24. Criminal Law ⇐986(3)

The sentencing judge must expressly evaluate in his or her sentencing order each statutory and non-statutory mitigating circumstance proposed by the defendant; this evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the non-statutory mitigating circumstance is truly of a mitigating nature.

25. Criminal Law ⇐1208.1(5)

A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence.

26. Criminal Law ⇐1208.1(5)

As a general matter, if the trial court conducts the proper inquiry, it is within its power to determine whether mitigating circumstances have been established by a preponderance of the evidence.

27. Criminal Law ⇐494
Homicide ⇐358(1)

Expert testimony alone does not require a finding in mitigation of extreme mental or emotional disturbance; even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case.

28. Homicide ⇐358(1)

Evidence supported trial court's finding that murder defendant's proffered statutory mental mitigators had not been established; court devoted nine pages to analyzing the often contradictory expert testimony and found state's expert witnesses to be more credible.

29. Homicide ⇐357(1)

Sentences of death for murders of two victims were not disproportionate, despite existence of some nonstatutory mitigation. West's F.S.A. Const. Art. 1, § 17.

30. Criminal Law ⇐1213.6

Convicted murder defendant's extended death row incarceration of over 20 years was not cruel and unusual punishment. U.S.C.A. Const.Amend. 8.

Bennett H. Brummer, Public Defender, and Louis Campbell, Assistant Public Defender, Eleventh Judicial Circuit, Miami, Florida, for Appellant.

Robert A. Butterworth, Attorney General, and Fariba N. Komeily, Assistant Attorney General, Miami, Florida, for Appellee.

PER CURIAM.

We have on appeal the sentences of the trial court imposing the death penalty on resentencing upon appellant Thomas Knight, n/k/a Askari Abdullah Muhammad. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. For the reasons expressed below, we affirm the imposition of the death sentences.

PROCEDURAL HISTORY

This case is a direct appeal from a resentencing proceeding, wherein the jury recommended two death sentences by a vote of nine to three. The trial judge accepted the jury's recommendation and imposed the death sentences on February 20, 1996.[1] The resentencing proceeding had been ordered by a federal appeals court on the basis of an error under *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) (requiring trial courts to consider non-statutory, as well as statutory, mitigating evidence proffered by a capital defendant). *Knight v. Dugger*, 863 F.2d 705 (11th Cir.1988).

Knight was convicted of the murders of Sydney and Lillian Gans and was sentenced to death. We affirmed his convictions and sentences on direct appeal. *Knight v. State*, 338 So.2d 201 (Fla.1976). Knight's subsequent habeas petition was dismissed by the trial court. Knight also fatally stabbed a prison guard, Officer James Burke, in his cell on death row on October 12, 1980, and was convicted and sentenced to death for that crime. This Court affirmed both the conviction and the sentence on direct appeal. *Muhammad v. State*, 494 So.2d 969 (Fla.1986). In his subsequent appeal of the trial court's denial of his 3.850 motion, this Court reversed the summary denial of Knight's *Brady*[2] claim and remanded for an evidentiary hearing on that issue alone. *Muhammad v. State*, 603 So.2d 488 (Fla.1992).

Subsequently, we rejected Knight's contention that he had received ineffective assistance of appellate counsel on direct appeal of his convictions for the Gans' murders. *Knight v. State*, 394 So.2d 997 (Fla.1981). After the Governor signed a death warrant for the Gans' murders, Knight filed a habeas petition and a motion for stay of execution in the federal district court. The district court granted the motion, retained jurisdiction over the petition, and ordered Knight to exhaust his alleged remaining state law claims.

Knight then filed a 3.850 motion in state court, which was denied, and on appeal the denial was affirmed. *Muhammad v. State*, 426 So.2d 533 (Fla.1982). Knight then resumed prosecution of his federal petition, and, after the trial court dismissed Knight's

1. The trial court found the following statutory aggravators: (1) Knight was previously convicted of a felony involving the use or threat of violence to the person, § 921.141(5)(b), Fla. Stat. (1995); (2) the murders were committed while Knight was engaged in the commission of a kidnapping, § 921.141(5)(d); (3) the murders were committed for the purpose of avoiding or preventing a lawful arrest, § 921.141(5)(e); (4) the murders were committed for pecuniary gain, § 921.141(5)(f); (5) the murders were especially heinous, atrocious, or cruel (HAC), § 921.141(5)(h); and (6) the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP), § 921.141(5)(i). The trial court considered and rejected Knight's proffered statutory mental mitigators. In nonstatutory mitigation, the trial court found and gave weight to the fact that Knight was a victim of childhood abuse; that he suffered from some degree of paranoia; and that he was raised in poverty.

2. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

petition, the Eleventh Circuit affirmed on six of the seven issues presented, but reversed on the *Hitchcock* issue.[3] The resentencing proceeding now being reviewed was mandated by that decision.

MATERIAL FACTS

On direct appeal, we related the following material facts:

> Upon arriving at his place of business and parking in his designated space, Mr. Gans was approached by the defendant who was carrying an automatic rifle and was told to re-enter his automobile, to drive home and get Mrs. Gans, and to drive to the bank and get $50,000. While inside the bank, Mr. Gans informed the president about the abduction. The police and FBI were alerted. Mr. Gans then returned to his car with the money. He and his wife, shortly thereafter, were found shot to death, the fatal shots—perforating through their necks—having been fired from the rear seat of the vehicle. Thereafter, Knight was apprehended and taken into custody in a wooded area about 2,000 feet from the Gans' vehicle. Underneath him buried in the dirt was an automatic rifle and a paper bag containing $50,000. There were blood stains on his pants.

Knight, 338 So.2d at 202. During the resentencing hearing, FBI Agent Terry Nelson testified that he was involved in all stages of the surveillance of the criminal episode. He arrived at City National Bank in an unmarked car, and observed the Gans' Mercedes, with Mrs. Gans driving and a black male with a rifle across his lap sitting in the right rear. After Mr. Gans returned to the car, the vehicle departed and followed a circuitous route before heading toward an unpopulated area of south Dade County.

Nelson momentarily lost sight of the Mercedes, and after regaining contact, Nelson again lost sight of the Mercedes as it proceeded along a canal ridge. When Nelson exited his vehicle for a better view, he received a radio call that two individuals had been shot and a black male was seen running into the woods nearby. The surveillance lasted for approximately an hour and covered about twenty miles. Nelson testified that Knight took no actions indicating he was aware of the surveillance.[4] The FBI and Dade County police vehicles participating were unmarked and none of the officers were in uniform. One STOL[5] aircraft and a helicopter were also involved in parts of the surveillance.

Dr. Joseph Davis, the original medical examiner, testified that Mrs. Gans was killed instantly from a bullet which entered the back right side of her neck and exited her left cheek. Mr. Gans was shot in the lower right side of the face, with the bullet having exited his jaw. His wound had stippling or gunpowder marks burnt into the flesh, indicating that he had been shot at point-blank range. Mr. Gans was found in the underbrush, a trail of blood indicating that he had been dragged out and away from the vehicle after being shot.

Detective Greg Smith testified that he was a member of the cold-case squad, having been assigned to the case in 1989 because the former lead detective, Detective Ojeda, had retired from the police department. Smith reviewed the trial testimony and reports of witnesses who were no longer available. Smith recounted to the judge and jury the testimony of the deceased Gans' company comptroller, Milton Marinek, the testimony of Detective Ojeda and, in rebuttal testimony, the sworn statement of the helicopter pilot, as well as relating the physical evidence presented at trial.

Numerous witnesses testified on Knight's behalf. They presented testimony that Knight, the second oldest of nine children, came from a family with a history of mental illness and neurological problems. Knight's

3. The court noted that the district court rendered its opinion prior to the Supreme Court's decision in *Hitchcock*. *Knight*, 863 F.2d at 708.

4. Nelson testified that Knight never became "hinge key," which is an FBI term for a suspect who is looking over his shoulder or who is concerned and paranoid that somebody might be following him.

5. STOL stands for Short Takeoff and Landing, like the United States Marine Corps AV-8B Harrier aircraft.

sisters Mary Ann, Doris, and Edna, as well as Deputy Patrick Duval, detailed the poverty, hunger, and brutal beatings Knight had sustained during his childhood in Fort Pierce. Knight's father was an alcoholic who had stopped providing for his family in 1960. Knight's father beat him often and with brutality. The Knight children often went without food or clothing. In June 1960, Knight's father raped Knight's sister Mary Ann. Knight, nine years old at the time, either witnessed his sister's rape and tried to stop it, or was told about it by Mary Ann immediately thereafter.

Knight was first arrested at age nine for theft. When he was arrested on the same charge several months later, he was committed to the Florida School for Boys, the youngest child ever sent there. He was continually in trouble thereafter, until at age fifteen he was sent to state prison on a burglary conviction. At age nineteen, he was committed to the Northeast Florida State Hospital where he was diagnosed with drug and poison intoxication, excessive drinking, and paranoid personality.

Numerous mental health experts testified to Knight's longstanding mental problems. Dr. Brad Fisher, a forensic psychologist, opined that Knight was a chronic schizophrenic. He testified that Knight was acting under an extreme mental or emotional disturbance at the time of the murders and that his ability to appreciate the criminality of his conduct was substantially impaired. Dr. Joyce Carbonell, a clinical psychologist, testified that Knight was a schizophrenic and that the statutory mental mitigators were manifested at the time of the murders. Dr. Thomas McLaine, a psychiatrist, testified that he evaluated Knight in 1991, concluding that he fell "somewhere between the severe personality disorder and the schizophrenic." He also opined that at the time of the killings, Knight was under the influence of an extreme mental or emotional disturbance and that his ability to conform his conduct to the requirements of the law was "somewhat impaired all the time and [has] been for most of his 45 years." Dr. Jethro Toomer, a psychologist, opined that the statutory mental mitigators applied at the time of the murders. Dr. David Rothenberg, a clinical psychologist, testified that Knight was a chronic paranoid schizophrenic. Dr. William Corwin, a psychiatrist, stated that Knight was argumentative, evasive, hostile, angry and that "there was some conscious exaggeration of his symptoms with a tendency to present himself as being actually ill." Dr. Arthur Wells, a psychologist, testified that when Knight committed the murders, he was "50 percent or more out of control, had no ability to reason, to judge what he was doing."

In rebuttal, the State called Dr. Eileen Fennell, a neuro-psychologist. She testified that Knight has a paranoid personality disorder, but is a malingerer who does not suffer from paranoid schizophrenia. Dr. Lloyd Miller, a forensic psychologist, likewise testified that Knight is a malingerer who does not have any major mental illnesses. Similarly, Dr. Charles Mutter, a forensic psychiatrist, found Knight to have a paranoid and antisocial personality, but no major mental illness.

Finally, Detective Smith was recalled on rebuttal and testified that his review of the prior testimony confirmed that no uniformed officers or marked vehicles were involved in the surveillance. Moreover, he testified that the STOL pilot's prior sworn testimony reflected that the pilot first saw the Mercedes after it had stopped and Knight was fleeing and that the helicopter pilot's prior sworn statement confirmed that observation.

As noted above, the jury recommended a death sentence for both murders and the judge agreed.

APPEAL

Knight raises seventeen claims of error on appeal,[6] several of which we resolve sum-

6. The claims are: (1) the trial court erred in allowing the presentation of Detective Smith's hearsay testimony; (2) the trial court erred in allowing Detective Smith to remain in the courtroom throughout the proceeding; (3) the prosecutor improperly relied on the future dangerousness nonstatutory aggravator; (4) the trial court in not instructing the jury that any life sentences would be consecutive; (5) the trial court erred in instructing the jury that Knight's absence was caused by his courtroom misconduct; (6) the trial court erred in allowing Dr. Miller's testimo-

marily.[7] We address the remaining issues in turn.

DETECTIVE SMITH'S TESTIMONY

[1] In his first claim, Knight contends that Detective Smith's hearsay testimony violated his right to confrontation, due process, and a reliable sentencing proceeding. The gravamen of Knight's claim is that Detective Smith's recounting, on rebuttal, of the helicopter pilot's prior sworn statement violated his Confrontation Clause right to confront and cross-examine witnesses because, unlike Smith's earlier testimony summarizing prior trial testimony, the pilot's statement had never been subjected to adversarial testing and lacked the reliability accorded former testimony. However, because Knight never specifically objected to Smith's testifying as to the contents of the pilot's statement, we find this claim procedurally barred.[8]

DETECTIVE SMITH'S PRESENCE IN COURTROOM

Knight next contends that the trial judge erred in granting the State's motion to allow Detective Smith to remain in the courtroom throughout the proceeding.

[2, 3] The purpose of the rule of sequestration is "to avoid a witness coloring his or her testimony by hearing the testimony of another," thereby discouraging "fabrication, inaccuracy and collusion." Charles W. Ehrhardt, *Florida Evidence* § 616.1, at 506 (1998 ed.). Section 90.616(2)(c), Florida Statutes (1997), allows an exception to the rule of sequestration for "[a] person whose presence is shown by the party's attorney to be essential to the presentation of the party's cause." This exception is applied most commonly to expert witnesses because "experts are testifying to their opinions rather than to factual matters." Ehrhardt, *supra* § 616.1, at 510. However, as Professor Ehrhardt has noted, in applying this exception to the rule of sequestration, the trial court "has wide discretion in determining which witnesses are essential." *Id.* at 509.

[4] While recognizing that Detective Smith was a fact witness, we conclude that the trial court did not abuse its discretion in ruling that the theory underlying exceptions to the rule is equally applicable to the unique

ny; (7) the trial court erred in denying the defense's peremptory challenge of juror Rivero-Saiz; (8) the trial court erred in excluding jurors Weldon, Zaribaf, and Cunningham from the panel; (9) improper prosecutorial argument denied Knight a fundamentally fair and reliable sentencing proceeding; (10) the trial court erred in not instructing the jury on merged aggravators; (11) the trial court erred in instructing the jury on the prior violent felony aggravator; (12) the trial court erred in instructing the jury on the cold, calculated, and premeditated (CCP) aggravator; (13) the trial court erred in instructing the jury on the heinous, atrocious, or cruel (HAC) aggravator; (14) the trial court erred in not instructing the jury on Knight's requested instruction on statutory mental mitigators; (15) the trial court erred in sentencing Knight to death; (16) Florida's death penalty statute is unconstitutional; and (17) executing Knight after his prolonged incarceration on death row constitutes cruel and unusual punishment.

7. Claim (7) is procedurally barred because the defense did not renew its objection before the jury was sworn. *Melbourne v. State*, 679 So.2d 759, 765 (Fla.1996). Claim (13) is without merit, having been rejected by this Court on numerous occasions where, as here, the HAC standard jury instruction is the same instruction approved in *Hall v. State*, 614 So.2d 473, 478 (Fla.1993), and found sufficient to withstand vagueness challenges to both the instruction and the aggravator. *See Chandler v. State*, 702 So.2d 186, 201 (Fla. 1997), *cert. denied*, — U.S. —, 118 S.Ct. 1535, 140 L.Ed.2d 685 (1998); *Mann v. State*, 705 So.2d 1 (Fla.1997), *cert. denied*, — U.S. —, 118 S.Ct. 2378, 141 L.Ed.2d 745 (1998); *Davis v. State*, 698 So.2d 1182 (Fla.1997), *cert. denied*, — U.S. —, 118 S.Ct. 1076, — L.Ed.2d — (1998). Finally, claim (16) has been consistently rejected by this Court, most recently in *Richardson v. State*, 706 So.2d 1349, 1356 (Fla.1998). *See also San Martin v. State*, 705 So.2d 1337, 1350 (Fla.1997), *cert. denied*, — U.S. —, 119 S.Ct. 105, — L.Ed.2d — (1998); *Williamson v. State*, 681 So.2d 688 (Fla.1996); *Hunter v. State*, 660 So.2d 244 (Fla.1995).

8. We also note that the trial court, in considering Knight's objection to Smith presenting a summary of former trial testimony, offered Knight the opportunity to have that testimony read to the jury as an alternative to Smith's presentation. In addition, Nelson's nonhearsay testimony covered much of the same ground and he participated throughout the surveillance, while the helicopter pilot only became involved at the end. Moreover, Smith's recitation of Detective Ojeda's trial ...timony recounted the same subject matter in great detail.

facts of this case. Smith was testifying as to what others had testified to two decades earlier, or as to what others had stated in sworn statements. Therefore, he was, in a sense, a reporter of what other individuals had long since said under oath in a recorded statement. His testimony was subject to being carefully checked by comparison to the transcripts of the trial testimony. Obviously, the prior statements of the individuals he was standing in for could not change based upon his presence during the testimony of the witnesses who preceded him. *See Randolph v. State*, 463 So.2d 186, 191 (Fla.1984) (noting that "[t]his is not a situation where the witness who was excluded from the sequestration rule was a principal actor in the crime, nor is this a case where the testimony of the witness was actually suggested by what he heard in the courtroom").[9] Accordingly, Smith's ongoing courtroom presence did not implicate any of the dangers normally implicit when a witness hears other testimony prior to testifying. As such, we conclude that the trial judge acted within his discretion on this issue.

FUTURE DANGEROUSNESS AS A NONSTATUTORY AGGRAVATOR

[5] Knight argues that because a defendant's future dangerousness cannot be used as a nonstatutory aggravating circumstance, the State impermissibly turned expert testimony that he had a longstanding mental illness into a nonstatutory aggravator by eliciting testimony that Knight's illness was almost impossible to cure, that Knight needed heavy structure and medication, and other similar comments. Knight further contends that the prosecutor accentuated this impropriety during closing argument by offering that Knight's own expert witness thought he was dangerous and untreatable and one who would "kill, and kill and kill again" if not executed.

[6–9] The State correctly notes that none of the instances of alleged impropriety were objected to or argued to the trial court and, therefore, they are procedurally barred. *See San Martin v. State*, 705 So.2d 1337, 1345 (Fla.1997). Ordinarily, allegedly improper prosecutorial comments not constituting fundamental error are not cognizable on appeal absent a contemporaneous objection. *See Urbin v. State*, 714 So.2d 411, 418 n. 8 (Fla. 1998); *Kilgore v. State*, 688 So.2d 895, 898 (Fla.1996).[10]

JURY INSTRUCTIONS ON CONSECUTIVE LIFE SENTENCES

[10] Knight argues that because he had already served twenty-two years on death

9. Although Knight is correct that the 1990 enactment of section 90.616, a statutory rule of sequestration, superseded the common law standard of "sound judicial discretion" in determining whether a witness should be excepted from the rule, *Randolph*, 463 So.2d at 191, the trial court still has the discretion to determine if the presence of the person is "essential to the presentation of the ... cause." *Strausser v. State*, 682 So.2d 539, 541 (Fla.1996). Therefore, while *Randolph*, its antecedents, and its progeny may no longer be "controlling" as to the scope of a judge's discretion, its reasoning as to what may be a permissible exception to the rule remains valid. Put another way, the judge retains discretion in dealing with this issue, but that discretion can only be exercised within the relevant statutory exceptions, subsections 2(c) and (d).

10. On the merits, Knight is certainly correct that a future dangerousness nonstatutory aggravating factor does not exist in Florida. *See Kormondy v. State*, 703 So.2d 454, 463 (Fla.1997) (noting that Florida's death penalty statute "does not authorize a dangerousness aggravating factor"). Of course, "the only matters that may be asserted in aggravation are those set out in the death penalty statute." *See Moore v. State*, 701 So.2d 545, 552 (Fla.1997) (Anstead, J., concurring in part and dissenting in part), *cert. denied*, — U.S. —, 118 S.Ct. 1536, 140 L.Ed.2d 685 (1998) and cases cited therein. Consequently, there is no such thing as a nonstatutory aggravating factor in Florida. At the same time, the State makes the argument that the prosecutor's "kill, and kill and kill again" comment was a proper statement of the evidence regarding Knight's past murders of Mr. and Mrs. Gans and Officer Burke and not a prediction of future homicidal violence if released. *Cf. Walker v. State*, 707 So.2d 300, 313–14 (Fla.1997) (finding improper prosecutor's query of neuropsychologist, "[w]ell, do you think [Walker] may kill again?"). Although the comment approaches the border of impropriety, and was probably subject to a valid objection, we conclude that the State did not impermissibly inject Knight's "future dangerousness" into the proceeding as an unlawful nonstatutory aggravating circumstance sufficiently to constitute fundamental error.

row by the time of resentencing, his parole ineligibility was a critical factor to be weighed with the jury's consideration of other mitigators. He contends that because the jury was aware that he could possibly be eligible for parole within three years if sentenced to concurrent life terms, the judge's withholding of his sentencing intentions if this contingency arose skewed the balancing process in favor of death, thus violating the Eighth Amendment.

As the State points out, we recently rejected a similar claim in *Walker v. State*, 707 So.2d 300 (Fla.1997). There, as here, the defendant was accused of a double homicide. Likewise, Walker argued to the jury that consecutive life sentences, each without the possibility of parole for twenty-five years, effectively precluded him from ever being released during his natural life. *Id.* at 314. While Knight correctly identifies the different times when he and Walker made their motions, the fact that both defense counsel and the trial judge informed the jury here that consecutive life sentences totaling a minimum mandatory of fifty years could be imposed was sufficient to fully apprise the jury of the consequences of a life recommendation, and we find no abuse of discretion in the trial court's ruling. We find that reasoning equally applicable irrespective of when the requested sentencing determination is made.

JURY INSTRUCTION ON KNIGHT'S ABSENCE FROM COURTROOM

[11] Knight was removed from the courtroom on a daily basis due to his refusal to remain silent. Nevertheless, Knight contends on appeal that the judge's explanation to the jury that the proceedings were not started on time because he "would not conform to accepted courtroom behavior" was unfairly prejudicial.

11. Immediately after Knight's second removal from the courtroom, the following exchange took place between the prosecutor, Mr. Laeser, and the trial judge:

> Mr. Laeser: I think the first thing that concerns me is whether or not we are going to spend an hour every morning going through the theater of the absurd or whether this proceeding is not going to have the benefit of Mr. Knight on future days.
>
> The Court: No. I am afraid that we are going to have to—it was not an hour. I actually counted 25 minutes. I feel obligated to ensure that no other judge is ever going to have to go through this, and I want the defendant here every day. If he can behave and he can announce—or it appears that he can behave, we will let him stay.

Our review of the record reveals that the trial judge bent over backwards to accord Knight his right to be present in the courtroom. Despite rambling monologues and general obstructionist conduct, the trial judge let Knight return to the courtroom every morning for another opportunity to behave properly and remain for the proceeding. However, without exception, Knight daily refused to obey the judge's instruction that he remain silent until the proper time. The judge was remarkably patient, even allowing a lengthy, uninterrupted monologue by Knight on the second day of voir dire, January 24, 1996. Shortly thereafter, Knight was again removed from the courtroom for refusing to obey the judge's instructions. Even then, the judge resolved to give Knight a "daily opportunity to act acceptably in court."

Moreover, the judge's actions were consistent with this Court's case law, as well as United States Supreme Court precedent. *See Illinois v. Allen*, 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) ("The flagrant disregard in the courtroom of elementary standards of proper conduct should and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case."); *Valdes v. State*, 626 So.2d 1316, 1321 (Fla.1993) (pronouncing that "[t]rial judges must be given sufficient discretion to meet the circumstances of each case where a defendant disrupts the proceedings"); *Diaz v. State*, 513 So.2d 1045, 1047 (Fla.1987) (applying *Allen* in finding that the "court's obligation to maintain safety and security in the courtroom outweighs, under proper circumstances, the risk that the security measures may impair the defendant's presumption of innocence"); *accord Joseph v. State*, 625 So.2d 109 (Fla. 3d DCA 1993). We find no error in the judge's instruction to the jury.

From the record it is apparent that Knight had every opportunity to remain in the courtroom, but chose to misbehave. Indeed, his consistently obstinate behavior, which he undoubtedly knew would cause his exclusion from the courtroom, also borders on invited error. *See San Martin v. State*, 705 So.2d 1337, 1347 (Fla.1997) (prohibiting party from inviting error and then complaining about it on appeal). Accordingly, we find that the judge acted within his discretion in repeatedly removing Knight from the courtroom, especially considering the testimony of numerous guards and jailhouse officials that Knight's out-of-court demeanor was completely at odds with his in-court histrionics. The judge's explanation to the jury was reasonable because it accurately reflected the obvious ongoing dilemma of the trial court in balancing Knight's rights with the need to maintain proper order and decorum in the courtroom.

DR. MILLER'S TESTIMONY

In his next claim of error, Knight correctly notes that Dr. Lloyd Miller had been twice appointed by the court for the sole purpose of evaluating Knight's competence and each time concluded that he was a malingerer. However, Knight claims that the State improperly called Dr. Miller to testify during its rebuttal case in violation of the confidentiality provision of Florida Rule of Criminal Procedure 3.211, Knight's Fifth Amendment right against self-incrimination, and his Sixth Amendment right to counsel. Knight also asserts that Dr. Miller's testimony was irrelevant and exceeded the proper scope of rebuttal.

[12] At the outset, we agree with the State that Knight never raised the confidentiality provision, Fifth Amendment, or Sixth Amendment issues in the trial court. Therefore, those sub-claims are procedurally barred. *See San Martin*, 705 So.2d at 1345 (citing *Steinhorst v. State*, 412 So.2d 332, 338 (Fla.1982), for proposition that "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below").

[13] As to the proper scope of rebuttal, the State persuasively argues that the defense opened the door to Dr. Miller's rebuttal testimony by addressing the issue of Knight's competence and referencing Dr. Miller's competency examination report itself. Appellee's Answer Brief at 57–58. Miller's testimony focused exclusively on the manner in which he conducts competency evaluations in general and some of the questions he asked Knight in particular. Therefore, we can discern no unfair prejudice to Knight from this line of questioning. Accordingly, we find no merit in this claim.

REMOVAL OF JURORS WELDON, ZARIBAF, AND CUNNINGHAM

[14] As his next claim of error, Knight challenges the trial court's removal of jurors Weldon, Zaribaf, and Cunningham because of extrinsic communications with a courthouse employee. For example, juror Cunningham told the trial court that the employee said that Knight was "a total psycho . . . he is in a wheelchair . . . [and] he is trying to starve himself to death." Despite asking the employee to cease commenting about the case three times, the employee kept talking and also mentioned that Knight had tried to commit suicide. During individual voir dire after the incident, all of the jurors said they could set it aside and be fair to both parties. However, on the State's motion, the court excused the three jurors on the basis that they now had outside information about Knight. Knight contends that the trial court's ruling violated his right to counsel because he alone was prejudiced by this improper contact, not the State.

We conclude that this incident presented a presumptive instance of prejudice where the jurors heard obviously improper commentary from a courthouse employee relating to Knight's mental health problems. Accordingly, we find no abuse of discretion in the trial court's removal of the three jurors.

PROSECUTOR'S COMMENTS

Knight claims that through comments and questions to defense expert witnesses, the

prosecutor placed before the jury irrelevant, highly prejudicial and inflammatory information. However, we agree with the State that this claim is procedurally barred because none of these arguments were raised in the trial court. *San Martin*, 705 So.2d at 1345.

[15] Even if this issue was properly preserved, we still would find no error. Although one of the cited prosecutor's comments regarding the value of Knight's and victims' lives was clearly improper, *see Urbin*, 714 So.2d at 420–21, we conclude this isolated instance of misconduct was not egregious enough to warrant voiding of the entire proceeding. *See Bertolotti v. State*, 476 So.2d 130, 133 (Fla.1985); *see also Shellito v. State*, 701 So.2d 837, 842 (Fla.1997) (determining that prosecutor's "brief reference to [defendant's] lack of remorse was of minor consequence and constituted harmless error"), *cert. denied*, — U.S. —, 118 S.Ct. 1537, 140 L.Ed.2d 686 (1998).

JURY INSTRUCTIONS ON MERGING OF AGGRAVATORS

Knight next claims that the trial court erred in refusing to instruct the jury on the merging of aggravators based on a common aspect of the offense. Knight contends that because the jurors could properly conclude that the kidnapping merged with either the HAC, avoid arrest, or pecuniary gain aggravators, the failure to give the merging instruction undermined the reliability of the jury's sentencing recommendation.

We agree with the State that this issue was not preserved below because no such argument regarding these specific grounds was made. Therefore, this claim is procedurally barred. *San Martin; Gore v. State*, 706 So.2d 1328 (Fla.1997), *cert. denied*, — U.S. —, 119 S.Ct. 212, — L.Ed.2d — (1998).

JURY INSTRUCTION ON PRIOR VIOLENT FELONY AGGRAVATOR

[16, 17] Knight claims that the trial court erred in instructing the jury on the prior violent felony aggravator. The State correctly notes that under *Elledge v. State*, 346 So.2d 998 (Fla.1977), and its progeny, previous violent felony convictions suffice for purposes of the prior violent felony aggravator so long as the convictions predate the sentencing, even when the crimes underlying the conviction occurred after the crime for which the defendant is being sentenced. Moreover, the State is also correct that even if the above analysis was inapplicable, any error would be harmless since each of the contemporaneous murders involved herein qualify as prior violent felony convictions, a rule of law recently reaffirmed by this Court. *See Mahn v. State*, 714 So.2d 391, 399 (Fla.1998) (citing *Windom v. State*, 656 So.2d 432, 440 (Fla.1995)).

JURY INSTRUCTION ON CCP AGGRAVATOR

Knight next asserts that the application of the CCP aggravator to the crimes he committed in 1974 is an ex post facto violation because the legislature did not enact that aggravator until 1979. Knight further contends that both the aggravator and jury instruction are unconstitutionally vague.

As Knight acknowledges, we have previously determined that application of the CCP aggravator in this situation is not an ex post facto violation. *Combs v. State*, 403 So.2d 418 (Fla.1981). Moreover, the jury instruction given here was the same instruction approved in *Jackson v. State*, 648 So.2d 85 (Fla.1994), an interim instruction we have repeatedly found constitutional.[12] *See, e.g., Walker*, 707 So.2d at 316; *Bell v. State*, 699 So.2d 674, 678 (Fla.1997), *cert. denied*, — U.S. —, 118 S.Ct. 1067, 140 L.Ed.2d 127 (1998).

REQUESTED JURY INSTRUCTION ON STATUTORY MENTAL MITIGATORS

Knight argues that the trial court's refusal to give expanded jury instructions on statutory mental mitigators was error because, among other things, Dr. Mutter suggested that to qualify as mitigating, a mental disturbance must be such that Knight did not know right from wrong. We find no error in the trial court's refusal to issue the expanded instructions.

This Court has repeatedly upheld the Florida standard jury instructions on mitigators, without requiring more. *Walls v. State*, 641 So.2d 381, 389 (Fla.1994). Accordingly, we affirm the trial court's ruling on this issue.

IMPOSITION OF DEATH SENTENCE

[18] Knight challenges the evidentiary basis of the trial court's imposition of death in this case. He contends that the trial court improperly weighed the proffered mitigation and erroneously found six aggravators.

The trial judge's lengthy and detailed sentencing order, replete with citations to the record and case law, is a comprehensive evaluation of all the salient weighing factors. The trial judge specified the sometimes conflicting evidence presented, analyzed the evidentiary basis of the proposed aggravators, evaluated the proffered mitigators and weighed those he found established. He further assessed the credibility of the expert witnesses, assigned weight to the expert opinions, and ruled accordingly. Consequently, Knight is hard pressed to show that the trial court erred in carrying out its responsibility to carefully consider each of the relevant aggravators and mitigators and assign proportionate weight to each.

AGGRAVATORS

As to the aggravators, the trial court's sentencing order details the evidence in support of the aggravators it found. As demonstrated above in our discussion on another issue, there really is no debate as to the validity of the prior violent felony aggravator. Likewise, the evidence outlined above supports the judge's finding that the murders were committed for pecuniary gain, especially the fact that even in flight, Knight still had the presence of mind to retain the paper bag containing $50,000. Similarly, there can be little doubt that the murders were committed during the commission of a kidnapping. Further, as noted in the judge's sentencing order, Knight did not challenge the applicability of this aggravator in his sentencing memorandum to the court. Hence, the finding as to three statutory aggravators is virtually undisputed.

AVOID ARREST

[19, 20] As we have recently reaffirmed, to support a valid avoid arrest aggravator where the victim is not a law enforcement officer, "the proof must demonstrate beyond a reasonable doubt that the victim was murdered solely or predominantly for the purpose of witness elimination." *Urbin*, 714 So.2d at 416. In finding that the State had met that burden in this case, the trial court observed:

> Had the sole motive for the murders been financial gain, the defendant's purpose would have been accomplished upon the receipt of the money. Even if he had wanted to perfect his get-away he could have taken the car after he asked the Ganses to exit the vehicle and driven away. His actions clearly indicate however that he ordered them back into the car, told them to drive to an even more secluded area and executed them.

Obviously, Knight had some purpose in mind, regardless of the state of his mental faculties, in killing the victims execution style at the end of his rambling journey to a remote location. We conclude that although the issue may be contested, there is sufficient evidence, including circumstantial evidence, to support the trial court's finding. Hence, we affirm the trial court's finding of the avoid arrest aggravator. *Urbin*.

HAC

[21, 22] However, as to HAC, we conclude that the trial court's description of the victims' ordeal during the time they were being abducted up to and including the time they were murdered was largely based upon conjecture and speculation. While the trial court's speculation as to what took place may well have occurred, there simply is no evidence in the record to fill in this void in the tragic episode or to rule out other possible scenarios. There simply is no evidence of what took place between the victims and Knight during the trip in the automobile

12. The new standard CCP jury instruction was approved by this Court on December 7, 1995. *See Standard Jury Instructions in Criminal Cases*, 665 So.2d 212 (Fla.1995).

before the execution-style killings took place. Hence, we conclude that the trial court erred in finding this aggravator. However, we find the error harmless in view of the finding of five other valid aggravators.

CCP

[23] Finally, as to CCP, the trial court cited evidence to support a finding as to all elements of that aggravator. Even if Knight did not make the final decision to execute the two victims until sometime during his lengthy journey to his final destination, that journey provided an abundance of time for Knight to coldly and calmly decide to kill. Based on our own review of the evidence in the record, we affirm the trial court's finding of this aggravator.

MITIGATION

[24–27] As to mitigation, in *Chandler v. State*, 702 So.2d 186 (Fla.1997), we reiterated the approved procedure by which trial courts must address such proffered evidence:

> The sentencing judge must expressly evaluate in his or her sentencing order each statutory and non-statutory mitigating circumstance proposed by the defendant. This evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the non-statutory mitigating circumstance is truly of a mitigating nature. A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence.

Id. at 200 (quoting *Ferrell v. State*, 653 So.2d 367, 371 (Fla.1995)). As a general matter, if the trial court conducts the proper inquiry, *see Walker*, 707 So.2d at 319 (directing trial courts to conduct "a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty"), it is within its power to determine whether mitigating circumstances have been established by a preponderance of the evidence. *Foster v. State*, 679 So.2d 747, 755 (Fla.1996). On the discrete issue of expert psychological evaluations of a defendant's mental health, "expert testimony alone does not require a finding of extreme mental or emotional disturbance. Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case." *Id.* at 755 (citation omitted); *see also Walls*, 641 So.2d at 390–91 (reasoning that opinion testimony "gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking").

[28] In this case, the trial judge spent over twenty pages evaluating Knight's proffered mitigators. The judge resolved the conflicts in the evidence regarding the statutory mental mitigators against Knight, finding the State's expert witnesses more credible and compelling. Consequently, after devoting nine pages in analyzing the often contradictory expert testimony, the judge found that the statutory mental mitigators had not been established. As underscored in *Chandler*, this is the process required by *Campbell v. State*, 571 So.2d 415 (Fla.1990), and *Ferrell*. *See Chandler*, 702 So.2d at 201.

Moreover, because we find that the trial court properly considered and weighed all of the evidence presented, we find no error in the court's rejection of Knight's proffered statutory mental mitigators. *Foster*, *accord Gudinas v. State*, 693 So.2d 953, 967 (Fla.) (affirming trial court's rejection of statutory mental mitigator where court concluded expert's opinion was "too heavily based upon unsupported facts"), *cert. denied*, — U.S. —, 118 S.Ct. 345, 139 L.Ed.2d 267 (1997). While the judge found no statutory mitigators established, we also recognize that the judge found and weighed the proffered nonstatutory mitigation, including the fact that Knight suffered from "some degree of paranoia." The judge then properly exercised his discretion and determined that the nonstatutory mitigation had been established. *Chandler*, 702 So.2d at 201. We find no error in the trial court's handling of the various subclaims in this issue.

PROPORTIONALITY

[29] In conjunction with our consideration of the previous claim, we address the issue of proportionality, as is our constitutional duty.[13] *See* Art. I, § 17, Fla. Const.; *Tillman v. State*, 591 So.2d 167, 169 (Fla. 1991) (identifying several state constitutional provisions which collectively mandate proportionality review in capital cases, "the purpose of which is to foster uniformity in death-penalty law"); *see also Urbin*, 714 So.2d at 417 (reaffirming that "proportionality review involves consideration of 'the totality of circumstances in a case' in comparison with other death penalty cases").

After fully considering the evidence in this case as we have outlined above, we conclude that Knight's death sentences are proportional to other cases where sentences of death have been imposed. *See Rolling v. State*, 695 So.2d 278 (Fla.) (affirming death sentences for multiple murders despite defendant's significant statutory and nonstatutory mental mitigation, including family's history of mental illness and defendant's physically and mentally abusive childhood), *cert. denied*, — U.S. —, 118 S.Ct. 448, 139 L.Ed.2d 383 (1997); *Henyard v. State*, 689 So.2d 239 (Fla. 1996) (affirming two death sentences despite trial court's finding of both statutory mental mitigators and nonstatutory mitigation involving defendant's stunted emotional level, low intelligence, impoverished upbringing, and dysfunctional family), *cert. denied*, — U.S. —, 118 S.Ct. 130, 139 L.Ed.2d 80 (1997).

EXTENDED DEATH ROW INCARCERATION AS CRUEL AND UNUSUAL PUNISHMENT

[30] Finally, Knight claims that to execute him after he has already endured more than two decades on death row is unconstitutionally cruel and unusual punishment. He also argues that Florida has forfeited its right to execute Knight under binding norms of international law. Although Knight makes an interesting argument, we find it lacks merit. As the State points out, no federal or state courts have accepted Knight's argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay. *See, e.g., White v. Johnson*, 79 F.3d 432 (5th Cir.1996); *State v. Smith*, 280 Mont. 158, 931 P.2d 1272 (Mont. 1996). We also note that the Arizona Supreme Court recently rejected this precise claim. *See State v. Schackart*, 190 Ariz. 238, 947 P.2d 315, 336 (Ariz.1997) (finding "no evidence that Arizona has set up a scheme prolonging incarceration in order to torture inmates prior to their execution"), *cert. denied*, — U.S. —, 119 S.Ct. 149, — L.Ed.2d — (1998). Second, we also consider that irrespective of the status of this case, Knight has been and will remain incarcerated on death row for his 1980 murder of Officer Burke until that case is finalized. We similarly reject Knight's claim under international law.

CONCLUSION

Accordingly, we affirm Knight's sentences of death.

It is so ordered.

SHAW, KOGAN, ANSTEAD and PARIENTE, JJ., concur.

HARDING, C.J., concurs specially with an opinion, in which OVERTON, J., concurs.

WELLS, J., concurs in part and dissents in part with an opinion.

HARDING, C.J., specially concurring.

I write separately to express my agreement with the majority's conclusion that the trial court erred in finding the heinous, atrocious, or cruel aggravating factor applicable in the instant case. I also write to explain why the instant case is distinguishable from *Preston v. State*, 607 So.2d 404 (Fla.1992), which both the sentencing order and Justice Wells cite in support of applying the HAC aggravator in this case.

As expressed in its sentencing order, the trial court concluded that the heinous, atrocious, or cruel nature of the murders committed by Knight "lies not in the method of [the victims'] execution[-]style murder[s] but in the torturous hours that preceded them." Execution-style killings are not generally HAC unless the State has presented other evidence to show some physical or mental

13. Neither party addressed this issue in their briefs.

torture of the victim. *Hartley v. State*, 686 So.2d 1316, 1323 (Fla.1996), *cert. denied*, — U.S. —, 118 S.Ct. 86, 139 L.Ed.2d 43 (1997). While the factual circumstances preceding the victims' killings in the instant case (being abducted at gunpoint, being coerced to withdraw money from their bank account, and being forced to drive to the remote location where they were shot) are supported by the record, the court's description of the victims' thoughts and feelings during their ordeal is based on conjecture and speculation. The sentencing order repeatedly states that the events "must have been horrifying" to the victims and that they must have anticipated "a horrible and painful death." "Speculation that the victim *may* have realized that the defendant[ ] intended more than a robbery when forcing the victim to drive to the field is insufficient to support [the HAC] aggravating factor." *Hartley*, 686 So.2d at 1323–24.

In order for the HAC aggravating circumstance to apply, the murder must be both conscienceless or pitiless and unnecessarily torturous to the victim. *Richardson v. State*, 604 So.2d 1107, 1109 (Fla.1992). While I agree with the trial court that "common sense" tells us that almost anyone faced with a loaded weapon would experience uncertainty, confusion, and fear, these normal responses are not enough to support the HAC aggravator nor do they rise to the level of "unnecessarily torturous to the victim," without additional acts that set the crime apart from the norm of capital felonies. *See, e.g., Wyatt v. State*, 641 So.2d 1336, 1340–41 (Fla. 1994) (concluding that HAC finding was proper based upon victims' "mental anguish" where defendant subjected them to twenty minutes of abuse prior to their deaths, including pistol-whipping one victim, raping the second victim, and taunting the third victim "to listen real close to hear the bullet coming" as he aimed a gun at the victim's ear); *Rivera v. State*, 561 So.2d 536, 540 (Fla.1990) (upholding HAC based upon "fear and emotional strain preceding a victim's death" where defendant abducted eleven-year-old girl, took her to a field where he sexually assaulted her, and testimony indicated that victim screamed and resisted until he was able to kill her by asphyxiation); *Adams v. State*, 412 So.2d 850, 857 (Fla.1982) (upholding HAC based upon "fear and emotional strain" preceding eight-year-old girl's death where record evidence showed that victim was "screaming" prior to death and was strangled by defendant).

In *Preston*, we concluded that the victim "[u]ndoubtedly" suffered fear and terror when Preston forced her "to drive to a remote location, made her walk at knifepoint through a dark field, forced her to disrobe, and then inflicted a wound certain to be fatal." *Preston*, 607 So.2d at 409. While this language might appear to support the application of the HAC aggravator in the instant case, the language of *Preston* must be considered within the factual circumstances of that case. The wound that Preston inflicted was "'[t]he deliberate slashing of the throat of the victim from one side to the other with the force necessary to sever the jugular veins, trachea and main arteries.'" *Preston v. State*, 444 So.2d 939, 945 (Fla.1984) (quoting from the original sentencing order).[14] This knife wound to the victim's throat resulted "in her near decapitation." 607 So.2d at 406. The victim also sustained "multiple stab wounds and lacerations." *Id.*

This Court has consistently upheld the heinous, atrocious, or cruel aggravator where the victim was repeatedly stabbed. *See Derrick v. State*, 641 So.2d 378, 381 (Fla.1994); *Floyd v. State*, 569 So.2d 1225, 1232 (Fla. 1990); *Haliburton v. State*, 561 So.2d 248, 252 (Fla.1990); *Nibert v. State*, 508 So.2d 1, 4 (Fla.1987); *Johnston v. State*, 497 So.2d 863, 871 (Fla.1986). Thus, the very nature of the attack in *Preston* supported the HAC finding. This was also the circumstance in many of the cases where the "fear and emotional strain preceding [the] victim's almost instantaneous death" was considered as contributing to the heinous nature of the murder. *Adams*, 412 So.2d at 857 (finding that victim's murder by strangulation was HAC and noting that Court has found this method of homicide to be HAC); *see also Hitchcock v. State*, 578 So.2d 685, 693 (Fla.1990) (upholding HAC aggravator and stating that strangulations are nearly per se heinous).

14. On appeal from the denial of relief on Preston's second postconviction motion, this Court vacated Preston's death sentence and ordered resentencing. *Preston v. State*, 564 So.2d 120 (Fla.1990). Preston's prior felony conviction was set aside due to ineffective assistance of trial counsel, leaving only two of the four aggravating circumstances found by the trial court. Obviously, the factual circumstances of the wounds inflicted on the victim did not change when the original sentencing order was vacated by this Court.

If we approved the application of the HAC aggravating factor in the instant case without some factual proof of the victims' mental torture, then the factor would apply in every instance where a normal person might feel fear. This would exclude only those homicides where the victim was ambushed or killed without awareness of the assailant. This clearly would go far beyond finding the HAC factor to be "appropriate in a 'conscienceless or pitiless crime which is unnecessarily torturous to the victim.'" *Richardson*, 604 So.2d at 1109 (quoting *Sochor v. Florida*, 504 U.S. 527, 536, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992)). I believe that such a broad interpretation of the HAC aggravating factor would render it unconstitutional because it would not provide the sentencer with adequate guidance. *See Sochor*, 504 U.S. at 536, 112 S.Ct. 2114. Accordingly, I conclude that the HAC factor is not permissible based on the present facts and concur with the majority opinion in striking this aggravator.

OVERTON, J., concurs.

WELLS, J., concurring in part and dissenting in part.

I concur in result only with the majority's decision.

I do not concur with footnote 10 that the prosecutor's comment was "probably subject to a valid objection." Further, I do not concur in the striking of HAC, and I believe under these facts that HAC is supported by competent, substantial evidence and that the application of the aggravator is consistent with this Court's decision in *Preston v. State*, 607 So.2d 404 (Fla.1992).

To conclude that this ordeal, which lasted several hours, did not provide factual proof of the victims' mental torture means that our law has to ignore the obvious and defy common sense and human experience. I do not believe our law has to do this, and I will not.

While I agree that the length of time Knight has been on death row does not create a constitutional impediment to his execution, I do again state my view that such an extended time period to finally adjudicate these cases is totally unacceptable and is this Court's and the State's prime responsibility to correct. *See Elledge v. Florida*, — U.S. —, 119 S.Ct. 366, — L.Ed.2d —, 67 U.S.L.W. 3256 (1998) (Breyer, J., dissenting). The murders in this case were committed in July 1974; Knight was convicted of the murders in April 1975. The courts and the State must be able to do better, and any explanation of why we are unable to do so is insufficient.

Anthony PERSICO, et al., Petitioners,

v.

Robert RUSSO, Respondent.

No. 92685.

Supreme Court of Florida.

Nov. 25, 1998.

Application for Review of the Decision of the District Court of Appeal—Certified Great Public Importance, Fourth District—No. 97-4216 (Broward County).

Leigh Katzman of Katzman & Korr, P.A. Margate, for Petitioners.

Stephan P. Lange of Lange and Lange P.A., Fort Lauderdale, for Respondent.

PARIENTE, Justice.

We have for review a decision certifyin the following question to be of great publ importance:

Supreme Court of Florida

THURSDAY, MARCH 11, 1999

THOMAS KNIGHT, N/K/A ASKARI ABDULLAH MUHAMMAD,	*	CASE NO. 87,783
Appellant,	*	Circuit Court Case No. F74-5978 (Dade County)
v.	*	
STATE OF FLORIDA,	*	
Appellee.	*	

* * * * * * * * * * * * * * *

The Motion for Rehearing filed by Appellant, having been considered in light of the revised opinion, is hereby denied.

HARDING, C.J., SHAW, WELLS, ANSTEAD, and PARIENTE, JJ., and OVERTON, Senior Justice, concur.

The Motion for Clarification filed by Appellee is hereby denied.

HARDING, C.J., SHAW, ANSTEAD, and PARIENTE, JJ., and OVERTON, Senior Justice, concur.
WELLS, J., dissents

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

JB
cc: Hon. Harvey Ruvin, Clerk
Hon. Joseph P. Farina., Chief Judge
Mr. Louis Campbell
Mr. Fariba Komeily

Supreme Court of Florida

THOMAS KNIGHT, N/K/A ASKARI ABDULLAH MUHAMMAD,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. 87,783

[November 12, 1998]

REVISED OPINION

PER CURIAM.

We have on appeal the sentences of the trial court imposing the death penalty on resentencing upon appellant Thomas Knight, n/k/a Askari Abdullah Muhammad. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. For the reasons expressed below, we affirm the imposition of the death sentences.

PROCEDURAL HISTORY

This case is a direct appeal from a resentencing proceeding, wherein the jury recommended two death sentences by a vote of nine to three. The trial judge accepted the jury's recommendation and imposed the death sentences on February 20, 1996.[1] The resentencing proceeding had been ordered by a federal appeals court on the basis of an error under Hitchcock v. Dugger, 481 U.S. 393 (1987) (requiring trial courts to consider non-statutory, as well as statutory, mitigating evidence proffered by a capital defendant). Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988).

Knight was convicted of the murders of Sydney and Lillian Gans and was sentenced to death. We affirmed his convictions and sentences on direct appeal. Knight v. State, 338 So. 2d 201 (Fla. 1976). Knight's

[1]The trial court found the following statutory aggravators: (1) Knight was previously convicted of a felony involving the use or threat of violence to the person, § 921.141(5)(b), Fla. Stat. (1995); (2) the murders were committed while Knight was engaged in the commission of a kidnapping, § 921.141(5)(d); (3) the murders were committed for the purpose of avoiding or preventing a lawful arrest, § 921.141(5)(e); (4) the murders were committed for pecuniary gain, § 921.141(5)(f); (5) the murders were especially heinous, atrocious, or cruel (HAC), § 921.141(5)(h); and (6) the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP), § 921.141(5)(i). The trial court considered and rejected Knight's proffered statutory mental mitigators. In nonstatutory mitigation, the trial court found and gave weight to the fact that Knight was a victim of childhood abuse; that he suffered from some degree of paranoia; and that he was raised in poverty.

subsequent habeas petition was dismissed by the trial court. Knight also fatally stabbed a prison guard, Officer James Burke, in his cell on death row on October 12, 1980, and was convicted and sentenced to death for that crime. This Court affirmed both the conviction and the sentence on direct appeal. Muhammad v. State, 494 So. 2d 969 (Fla. 1986). In his subsequent appeal of the trial court's denial of his 3.850 motion, this Court reversed the summary denial of Knight's Brady[2] claim and remanded for an evidentiary hearing on that issue alone. Muhammad v. State, 603 So. 2d 488 (Fla. 1992).

Subsequently, we rejected Knight's contention that he had received ineffective assistance of appellate counsel on direct appeal of his convictions for the Gans' murders. Knight v. State, 394 So. 2d 997 (Fla. 1981). After the Governor signed a death warrant for the Gans' murders, Knight filed a habeas petition and a motion for stay of execution in the federal district court. The district court granted the motion, retained jurisdiction over the petition, and ordered Knight to exhaust his alleged remaining state law claims.

Knight then filed a 3.850 motion in state court, which was denied, and on appeal the denial was affirmed. Muhammad v. State, 426 So. 2d 533 (Fla. 1982). Knight then resumed prosecution of his federal petition, and, after the trial court dismissed Knight's petition, the Eleventh Circuit affirmed on six of the seven issues presented, but reversed on the Hitchcock issue.[3] The resentencing proceeding now being reviewed was mandated by that decision.

MATERIAL FACTS

On direct appeal, we related the following material facts:

> Upon arriving at his place of business and parking in his designated space, Mr. Gans was approached by the defendant who was carrying an automatic rifle and was told to re-enter his automobile, to drive home and get Mrs. Gans, and to drive to the bank and get $50,000. While inside the bank, Mr. Gans informed the president about the abduction. The police and FBI were alerted. Mr. Gans then returned to his car with the money. He and his wife, shortly thereafter, were found shot to death, the fatal shots--perforating through their necks--having been fired from the rear seat of the vehicle. Thereafter, Knight was apprehended and taken into custody in a weeded area about 2,000 feet from the Gans' vehicle. Underneath him buried in the dirt was an automatic rifle and a paper bag containing $50,000. There were blood stains on his pants.

Knight, 338 So. 2d at 202. During the resentencing hearing, FBI Agent Terry Nelson testified that he was involved in all stages of the surveillance of the criminal episode. He arrived at City National Bank in an unmarked car, and observed the Gans' Mercedes, with Mrs. Gans driving and a black male with a rifle across his lap sitting in the right rear. After Mr. Gans returned to the car, the vehicle departed and followed a circuitous route before heading toward an unpopulated area of south Dade County.

Nelson momentarily lost sight of the Mercedes, and after regaining contact, Nelson again lost sight of the Mercedes as it proceeded along a canal ridge. When Nelson exited his vehicle for a better view, he received a radio call that two individuals had been shot and a black male was seen running into the woods nearby. The surveillance lasted for approximately an hour and covered about twenty miles. Nelson testified that Knight took no actions indicating he was aware of the surveillance.[4] The FBI and Dade County police vehicles participating were unmarked and none of the officers were in uniform. One STOL[5] aircraft and a helicopter were also involved in parts of the surveillance.

Dr. Joseph Davis, the original medical examiner, testified that Mrs. Gans was killed instantly from a bullet which entered the back right side of her neck and exited her left cheek. Mr. Gans was shot in the lower right side of the face, with the bullet having exited his jaw. His wound had stippling or gunpowder marks burnt into the flesh, indicating that he had been shot at point-blank range. Mr. Gans was found in the underbrush, a trail of blood indicating that he had been dragged out and away from the vehicle after being shot.

Detective Greg Smith testified that he was a member of the cold-case squad, having been assigned to the case in 1989 because the former lead detective, Detective Ojeda, had retired

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[2]Brady v. Maryland, 373 U.S. 83 (1963).

[3]The court noted that the district court rendered its opinion prior to the Supreme Court's decision in Hitchcock. Knight, 863 F.2d at 708.

[4]Nelson testified that Knight never became "hinge key," which is an FBI term for a suspect who is looking over his shoulder or who is concerned and paranoid that somebody might be following him.

[5]STOL stands for Short Takeoff and Landing, like the United States Marine Corps AV-8B Harrier aircraft.

from the police department. Smith reviewed the trial testimony and reports of witnesses who were no longer available. Smith recounted to the judge and jury the testimony of the deceased Gans' company comptroller, Milton Marinek, the testimony of Detective Ojeda and, in rebuttal testimony, the sworn statement of the helicopter pilot, as well as relating the physical evidence presented at trial.

Numerous witnesses testified on Knight's behalf. They presented testimony that Knight, the second oldest of nine children, came from a family with a history of mental illness and neurological problems. Knight's sisters Mary Ann, Doris, and Edna, as well as Deputy Patrick Duval, detailed the poverty, hunger, and brutal beatings Knight had sustained during his childhood in Fort Pierce. Knight's father was an alcoholic who had stopped providing for his family in 1960. Knight's father beat him often and with brutality. The Knight children often went without food or clothing. In June 1960, Knight's father raped Knight's sister Mary Ann. Knight, nine years old at the time, either witnessed his sister's rape and tried to stop it, or was told about it by Mary Ann immediately thereafter.

Knight was first arrested at age nine for theft. When he was arrested on the same charge several months later, he was committed to the Florida School for Boys, the youngest child ever sent there. He was continually in trouble thereafter, until at age fifteen he was sent to state prison on a burglary conviction. At age nineteen, he was committed to the Northeast Florida State Hospital where he was diagnosed with drug and poison intoxication, excessive drinking, and paranoid personality.

Numerous mental health experts testified to Knight's longstanding mental problems. Dr. Brad Fisher, a forensic psychologist, opined that Knight was a chronic schizophrenic. He testified that Knight was acting under an extreme mental or emotional disturbance at the time of the murders and that his ability to appreciate the criminality of his conduct was substantially impaired. Dr. Joyce Carbonell, a clinical psychologist, testified that Knight was a schizophrenic and that the statutory mental mitigators were manifested at the time of the murders. Dr. Thomas McLaine, a psychiatrist, testified that he evaluated Knight in 1991, concluding that he fell "somewhere between the severe personality disorder and the schizophrenic." He also opined that at the time of the killings, Knight was under the influence of an extreme mental or emotional disturbance and that his ability to conform his conduct to the requirements of the law was "somewhat impaired all the time and

[has] been for most of his 45 years." Dr. Jethro Toomer, a psychologist, opined that the statutory mental mitigators applied at the time of the murders. Dr. David Rothenberg, a clinical psychologist, testified that Knight was a chronic paranoid schizophrenic. Dr. William Corwin, a psychiatrist, stated that Knight was argumentative, evasive, hostile, angry and that "there was some conscious exaggeration of his symptoms with a tendency to present himself as being actually ill." Dr. Arthur Wells, a psychologist, testified that when Knight committed the murders, he was "50 percent or more out of control, had no ability to reason, to judge what he was doing."

In rebuttal, the State called Dr. Eileen Fennell, a neuro-psychologist. She testified that Knight has a paranoid personality disorder, but is a malingerer who does not suffer from paranoid schizophrenia. Dr. Lloyd Miller, a forensic psychologist, likewise testified that Knight is a malingerer who does not have any major mental illnesses. Similarly, Dr. Charles Mutter, a forensic psychiatrist, found Knight to have a paranoid and antisocial personality, but no major mental illness.

Finally, Detective Smith was recalled on rebuttal and testified that his review of the prior testimony confirmed that no uniformed officers or marked vehicles were involved in the surveillance. Moreover, he testified that the STOL pilot's prior sworn testimony reflected that the pilot first saw the Mercedes after it had stopped and Knight was fleeing and that the helicopter pilot's prior sworn statement confirmed that observation.

As noted above, the jury recommended a death sentence for both murders and the judge agreed.

APPEAL

Knight raises seventeen claims of error on appeal,[6] several of which we

[6]The claims are: (1) the trial court erred in allowing the presentation of Detective Smith's hearsay testimony; (2) the trial court erred in allowing Detective Smith to remain in the courtroom throughout the proceeding; (3) the prosecutor improperly relied on the future dangerousness nonstatutory aggravator; (4) the trial court in not instructing the jury that any life sentences would be consecutive; (5) the trial court erred in instructing the jury that Knight's absence was caused by his courtroom misconduct; (6) the trial court erred in allowing Dr. Miller's testimony; (7) the trial court erred in denying the defense's peremptory challenge of juror Rivero-Saiz; (8) the trial court erred in excluding jurors Weldon, Zaribaf, and Cunningham from the panel; (9) improper prosecutorial argument denied Knight a fundamentally fair and reliable sentencing proceeding; (10) the trial court erred in not instructing the jury on merged aggravators; (11) the trial court erred in instructing the jury on the prior violent felony aggravator; (12) the trial court erred in instructing the jury on the cold, calculated, and premeditated (CCP) aggravator; (13) the trial court erred in instructing the jury on the heinous, atrocious, or cruel (HAC) aggravator; (14) the trial court erred in not instructing the jury on Knight's requested instruction on statutory mental mitigators; (15) the trial court erred in sentencing Knight to death; (16) Florida's death penalty statute is unconstitutional; and (17) executing Knight after his prolonged incarceration on death row constitutes cruel and unusual punishment.

resolve summarily.[7] We address the remaining issues in turn.

DETECTIVE SMITH'S TESTIMONY

In his first claim, Knight contends that Detective Smith's hearsay testimony violated his right to confrontation, due process, and a reliable sentencing proceeding. The gravamen of Knight's claim is that Detective Smith's recounting, on rebuttal, of the helicopter pilot's prior sworn statement violated his Confrontation Clause right to confront and cross-examine witnesses because, unlike Smith's earlier testimony summarizing prior trial testimony, the pilot's statement had never been subjected to adversarial testing and lacked the reliability accorded former testimony. However, because Knight never specifically objected to Smith's testifying as to the contents of the pilot's statement, we find this claim procedurally barred.[8]

DETECTIVE SMITH'S PRESENCE IN COURTROOM

Knight next contends that the trial judge erred in granting the State's motion to allow Detective Smith to remain in the courtroom throughout the proceeding.

The purpose of the rule of sequestration is "to avoid a witness coloring his or her testimony by hearing the testimony of another," thereby discouraging "fabrication, inaccuracy and collusion." Charles W. Ehrhardt, Florida Evidence § 616.1, at 506 (1998 ed.). Section 90.616(2)(c), Florida Statutes (1997), allows an exception to the rule of sequestration for "[a] person whose presence is shown by the party's attorney to be essential to the presentation of the party's cause." This exception is applied most commonly to expert witnesses because "experts are testifying to their opinions rather than to factual matters." Ehrhardt, supra § 616.1, at 510. However, as Professor Ehrhardt has noted, in applying this exception to the rule of sequestration, the trial court "has wide discretion in determining which witnesses are essential." Id. at 509.

While recognizing that Detective Smith was a fact witness, we conclude that the trial court did not abuse its discretion in ruling that the theory underlying exceptions to the rule is equally applicable to the unique facts of this case. Smith was testifying as to what others had testified to two decades earlier, or as to what others had stated in sworn statements. Therefore, he was, in a sense, a reporter of what other individuals had long since said under oath in a recorded statement. His testimony was subject to being carefully checked by comparison to the transcripts of the trial testimony. Obviously, the prior statements of the individuals he was standing in for could not change based upon his presence during the testimony of the witnesses who preceded him. See Randolph v. State, 463 So. 2d 186, 191 (Fla. 1984) (noting that "[t]his is not a situation where the witness who was excluded from the sequestration rule was a principal actor in the crime, nor is this a case where the testimony of the witness was actually suggested by what he heard in the courtroom").[9] Accordingly, Smith's ongoing courtroom presence did not implicate any of the dangers normally implicit when a witness hears other testimony prior to testifying. As such, we conclude that the trial judge acted within his discretion on this issue.

FUTURE DANGEROUSNESS AS A NONSTATUTORY AGGRAVATOR

Knight argues that because a defendant's future dangerousness cannot be used as a nonstatutory aggravating circumstance, the State impermissibly turned expert testimony that he had a longstanding mental illness into a nonstatutory aggravator by eliciting testimony that Knight's illness was almost impossible to cure, that Knight needed heavy structure and medication, and other similar comments. Knight further contends that the prosecutor accentuated this impropriety during closing argument by offering that Knight's own expert witness thought he was dangerous and untreatable and one who would "kill, and kill and kill again" if not executed.

The State correctly notes that none of the instances of alleged impropriety were objected to or argued to the trial

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[7]Claim (7) is procedurally barred because the defense did not renew its objection before the jury was sworn. Melbourne v. State, 679 So. 2d 759, 765 (Fla. 1996). Claim (13) is without merit, having been rejected by this Court on numerous occasions where, as here, the HAC standard jury instruction is the same instruction approved in Hall v. State, 614 So. 2d 473, 478 (Fla. 1993), and found sufficient to withstand vagueness challenges to both the instruction and the aggravator. See Chandler v. State, 702 So. 2d 186, 201 (Fla. 1997), cert. denied, 118 S. Ct. 1535 (1998); Monlyn v. State, 705 So. 2d 1 (Fla. 1997), cert. denied, 118 S. ct. 2378 (1998); Davis v. State, 698 So. 2d 1182 (Fla. 1997), cert. denied, 118 S. Ct. 1076 (1998). Finally, claim (16) has been consistently rejected by this Court, most recently in Richardson v. State, 706 So. 2d 1349, 1356 (Fla. 1998). See also San Martin v. State, 705 So. 2d 1337, 1350 (Fla. 1997), cert. denied, No. 97-9227 (U.S. Oct. 5, 1998); Williamson v. State, 681 So. 2d 688 (Fla. 1996); Hunter v. State, 660 So. 2d 244 (Fla. 1995).

[8]We also note that the trial court, in considering Knight's objection to Smith presenting a summary of former trial testimony, offered Knight the opportunity to have that testimony read to the jury as an alternative to Smith's presentation. In addition, Nelson's nonhearsay testimony covered much of the same ground and he participated throughout the surveillance, while the helicopter pilot only became involved at the end. Moreover, while Smith admittedly was called to the stand to rebut the defense's theory that the air surveillance caused Knight's loss of mental faculties, his recitation of Detective Ojeda's trial testimony recounted the same subject matter as that presented by Nelson.

[9]We likewise reject on procedural grounds Knight's claim that statements by the STOL pilot and Detective Ojeda should not have been admitted (through the testimony of Smith) absent a showing that the pilot and the detective were unavailable. Knight did not object to Smith's testimony as to statements made by either of these persons.

court and, therefore, they are procedurally barred. See San Martin v. State, 705 So. 2d 1337, 1345 (Fla. 1997). Ordinarily, allegedly improper prosecutorial comments not constituting fundamental error are not cognizable on appeal absent a contemporaneous objection. See Urbin v. State, 714 So. 2d 411, 418 n.8 (Fla. 1998); Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996).[10]

JURY INSTRUCTIONS ON CONSECUTIVE LIFE SENTENCES

Knight argues that because he had already served twenty-two years on death row by the time of resentencing, his parole ineligibility was a critical factor to be weighed with the jury's consideration of other mitigators. He contends that because the jury was aware that he could possibly be eligible for parole within three years if sentenced to concurrent life terms, the judge's withholding of his sentencing intentions if this contingency arose skewed the balancing process in favor of death, thus violating the Eighth Amendment.

As the State points out, we recently rejected a similar claim in Walker v. State, 707 So. 2d 300 (Fla. 1997). There, as here, the defendant was accused of a double homicide. Likewise, Walker argued to the jury that consecutive life sentences, each without the possibility of parole for twenty-five years, effectively precluded him from ever being released during his natural life. Id. at 314. While Knight correctly identifies the different times when he and Walker made their motions, the fact that both defense counsel and the trial judge informed the jury here that consecutive life sentences totaling a minimum mandatory of fifty years could be imposed was sufficient to fully apprise the jury of the consequences of a life recommendation, and we find no abuse of discretion in the trial court's ruling. We find that reasoning equally applicable irrespective of when the requested sentencing determination is made.

[10]On the merits, Knight is certainly correct that a future dangerousness nonstatutory aggravating factor does not exist in Florida. See Kormondy v. State, 703 So. 2d 454, 463 (Fla. 1997) (noting that Florida's death penalty statute "does not authorize a dangerousness aggravating factor"). Of course, "the only matters that may be asserted in aggravation are those set out in the death penalty statute." See Moore v. State, 701 So. 2d 545, 552 (Fla. 1997) (Anstead, J., concurring in part and dissenting in part), cert. denied, 118 S. Ct. 1536 (1998) and cases cited therein. Consequently, there is no such thing as a nonstatutory aggravating factor in Florida. At the same time, the State makes the argument that the prosecutor's "kill, and kill and kill again" comment was a proper statement of the evidence regarding Knight's past murders of Mr. and Mrs. Gans and Officer Burke and not a prediction of future homicidal violence if released. Cf. Walker v. State, 707 So. 2d 300, 313-14 (Fla. 1997) (finding improper prosecutor's query of neuropsychologist, "[w]ell, do you think [Walker] may kill again?"). Although the comment approaches the border of impropriety, and was probably subject to a valid objection, we conclude that the State did not impermissibly inject Knight's "future dangerousness" into the proceeding as an unlawful nonstatutory aggravating circumstance sufficiently to constitute fundamental error.

JURY INSTRUCTION ON KNIGHT'S ABSENCE FROM COURTROOM

Knight was removed from the courtroom on a daily basis due to his refusal to remain silent. Nevertheless, Knight contends on appeal that the judge's explanation to the jury that the proceedings were not started on time because he "would not conform to accepted courtroom behavior" was unfairly prejudicial.

Our review of the record reveals that the trial judge bent over backwards to accord Knight his right to be present in the courtroom. Despite rambling monologues and general obstructionist conduct, the trial judge let Knight return to the courtroom every morning for another opportunity to behave properly and remain for the proceeding. However, without exception, Knight daily refused to obey the judge's instruction that he remain silent until the proper time. The judge was remarkably patient, even allowing a lengthy, uninterrupted monologue by Knight on the second day of voir dire, January 24, 1996. Shortly thereafter, Knight was again removed from the courtroom for refusing to obey the judge's instructions. Even then, the judge resolved to give Knight a daily opportunity to act acceptably in court.[11]

Moreover, the judge's actions were consistent with this Court's case law, as well as United States Supreme Court precedent. See Illinois v. Allen, 397 U.S. 337, 343 (1970) ("The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case."); Valdes v. State, 626 So. 2d 1316, 1321 (Fla. 1993) (pronouncing that "[t]rial judges must be given sufficient discretion to meet the circumstances of each case where a defendant disrupts the proceedings"); Diaz v. State, 513 So.

[11]Immediately after Knight's second removal from the courtroom, the following exchange took place between the prosecutor, Mr. Laeser, and the trial judge:

> Mr. Laeser: I think the first thing that concerns me is whether or not we are going to spend an hour every morning going through the theater of the absurd or whether this proceeding is not going to have the benefit of Mr. Knight on future days.
>
> The Court: No. I am afraid that we are going to have to--it was not an hour. I actually counted 25 minutes. I feel obligated to ensure that no other judge is ever going to have to go through this, and I want the defendant here every day. If he can behave and he can announce--or it appears that he can behave, we will let him stay.

2d 1045, 1047 (Fla. 1987) (applying Allen in finding that the "court's obligation to maintain safety and security in the courtroom outweighs, under proper circumstances, the risk that the security measures may impair the defendant's presumption of innocence"); accord Joseph v. State, 625 So. 2d 109 (Fla. 3d DCA 1993). We find no error in the judge's instruction to the jury.

From the record it is apparent that Knight had every opportunity to remain in the courtroom, but chose to misbehave. Indeed, his consistently obstinate behavior, which he undoubtedly knew would cause his exclusion from the courtroom, also borders on invited error. See San Martin v. State, 705 So. 2d 1337, 1347 (Fla. 1997) (prohibiting party from inviting error and then complaining about it on appeal). Accordingly, we find that the judge acted within his discretion in repeatedly removing Knight from the courtroom, especially considering the testimony of numerous guards and jailhouse officials that Knight's out-of-court demeanor was completely at odds with his in-court histrionics. The judge's explanation to the jury was reasonable because it accurately reflected the obvious ongoing dilemma of the trial court in balancing Knight's rights with the need to maintain proper order and decorum in the courtroom.

DR. MILLER'S TESTIMONY

In his next claim of error, Knight correctly notes that Dr. Lloyd Miller had been twice appointed by the court for the sole purpose of evaluating Knight's competence and each time concluded that he was a malingerer. However, Knight claims that the State improperly called Dr. Miller to testify during its rebuttal case in violation of the confidentiality provision of Florida Rule of Criminal Procedure 3.211, Knight's Fifth Amendment right against self-incrimination, and his Sixth Amendment right to counsel. Knight also asserts that Dr. Miller's testimony was irrelevant and exceeded the proper scope of rebuttal.

At the outset, we agree with the State that Knight never raised the confidentiality provision, Fifth Amendment, or Sixth Amendment issues in the trial court. Therefore, those sub-claims are procedurally barred. See San Martin, 705 So. 2d at 1345 (citing Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982), for proposition that "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below").

As to the proper scope of rebuttal, the State persuasively argues that the defense opened the door to Dr. Miller's rebuttal testimony by addressing the issue of Knight's competence and

referencing Dr. Miller's competency examination report itself. Appellee's Answer Brief at 57-58. Miller's testimony focused exclusively on the manner in which he conducts competency evaluations in general and some of the questions he asked Knight in particular. Therefore, we can discern no unfair prejudice to Knight from this line of questioning. Accordingly, we find no merit in this claim.

REMOVAL OF JURORS WELDON, ZARIBAF, AND CUNNINGHAM

As his next claim of error, Knight challenges the trial court's removal of jurors Weldon, Zaribaf, and Cunningham because of extrinsic communications with a courthouse employee. For example, juror Cunningham told the trial court that the employee said that Knight was "a total pscyho . . . he is in a wheelchair . . . [and] he is trying to starve himself to death." Despite asking the employee to cease commenting about the case three times, the employee kept talking and also mentioned that Knight had tried to commit suicide. During individual voir dire after the incident, all of the jurors said they could set it aside and be fair to both parties. However, on the State's motion, the court excused the three jurors on the basis that they now had outside information about Knight. Knight contends that the trial court's ruling violated his right to counsel because he alone was prejudiced by this improper contact, not the State.

We conclude that this incident presented a presumptive instance of prejudice where the jurors heard obviously improper commentary from a courthouse employee relating to Knight's mental health problems. Accordingly, we find no abuse of discretion in the trial court's removal of the three jurors.

PROSECUTOR'S COMMENTS

Knight claims that through comments and questions to defense expert witnesses, the prosecutor placed before the jury irrelevant, highly prejudicial and inflammatory information. However, we agree with the State that this claim is procedurally barred because none of these arguments were raised in the trial court. San Martin, 705 So. 2d at 1345.

Even if this issue was properly preserved, we still would find no error. Although one of the cited prosecutor's comments regarding the value of Knight's and victims' lives was clearly improper, see Urbin, 714 So. 2d at 420-21, we conclude this isolated instance of misconduct was not egregious enough to warrant voiding of the entire proceeding. See Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985); see also Shellito v. State, 701 So. 2d 837, 842 (Fla. 1997) (determining that prosecutor's "brief reference to [defendant's] lack of remorse was of

minor consequence and constituted harmless error"), cert. denied, 118 S. Ct. 1537 (1998).

JURY INSTRUCTIONS ON MERGING OF AGGRAVATORS

Knight next claims that the trial court erred in refusing to instruct the jury on the merging of aggravators based on a common aspect of the offense. Knight contends that because the jurors could properly conclude that the kidnapping merged with either the HAC, avoid arrest, or pecuniary gain aggravators, the failure to give the merging instruction undermined the reliability of the jury's sentencing recommendation.

We agree with the State that this issue was not preserved below because no such argument regarding these specific grounds was made. Therefore, this claim is procedurally barred. San Martin; Gore v. State, 706 So. 2d 1328 (Fla. 1997), cert. denied, No. 98-5210 (U.S. Oct. 5, 1998).

JURY INSTRUCTION ON PRIOR VIOLENT FELONY AGGRAVATOR

Knight claims that the trial court erred in instructing the jury on the prior violent felony aggravator. The State correctly notes that under Elledge v. State, 346 So. 2d 998 (Fla. 1977), and its progeny, previous violent felony convictions suffice for purposes of the prior violent felony aggravator so long as the convictions predate the sentencing, even when the crimes underlying the conviction occurred after the crime for which the defendant is being sentenced. Moreover, the State is also correct that even if the above analysis was inapplicable, any error would be harmless since each of the contemporaneous murders involved herein qualify as prior violent felony convictions, a rule of law recently reaffirmed by this Court. See Mahn v. State, 714 So. 2d 391, 399 (Fla. 1998) (citing Windom v. State, 656 So. 2d 432, 440 (Fla. 1995)).

JURY INSTRUCTION ON CCP AGGRAVATOR

Knight next asserts that the application of the CCP aggravator to the crimes he committed in 1974 is an ex post facto violation because the legislature did not enact that aggravator until 1979. Knight further contends that both the aggravator and jury instruction are unconstitutionally vague.

As Knight acknowledges, we have previously determined that application of the CCP aggravator in this situation is not an ex post facto violation. Combs v. State, 403 So. 2d 418 (Fla. 1981). Moreover, the jury instruction given here was the same instruction approved in Jackson v. State, 648 So. 2d 85 (Fla. 1994), an interim instruction we have repeatedly found

constitutional.[12] See, e.g., Walker, 707 So. 2d at 316; Bell v. State, 699 So. 2d 674, 678 (Fla. 1997), cert. denied, 118 S. Ct. 1067 (1998).

REQUESTED JURY INSTRUCTION ON STATUTORY MENTAL MITIGATORS

Knight argues that the trial court's refusal to give expanded jury instructions on statutory mental mitigators was error because, among other things, Dr. Mutter suggested that to qualify as mitigating, a mental disturbance must be such that Knight did not know right from wrong. We find no error in the trial court's refusal to issue the expanded instructions.

This Court has repeatedly upheld the Florida standard jury instructions on mitigators, without requiring more. Walls v. State, 641 So. 2d 381, 389 (Fla. 1994). Accordingly, we affirm the trial court's ruling on this issue.

IMPOSITION OF DEATH SENTENCE

Knight challenges the evidentiary basis of the trial court's imposition of death in this case. He contends that the trial court improperly weighed the proffered mitigation and erroneously found six aggravators.

The trial judge's lengthy and detailed sentencing order, replete with citations to the record and case law, is a comprehensive evaluation of all the salient weighing factors. The trial judge specified the sometimes conflicting evidence presented, analyzed the evidentiary basis of the proposed aggravators, evaluated the proffered mitigators and weighed those he found established. He further assessed the credibility of the expert witnesses, assigned weight to the expert opinions, and ruled accordingly. Consequently, Knight is hard pressed to show that the trial court erred in carrying out its responsibility to carefully consider each of the relevant aggravators and mitigators and assign proportionate weight to each.

AGGRAVATORS

As to the aggravators, the trial court's sentencing order details the evidence in support of the aggravators it found. As demonstrated above in our discussion on another issue, there really is no debate as to the validity of the prior violent felony aggravator. Likewise, the evidence outlined above supports the judge's finding that the murders were committed for pecuniary gain, especially the fact that even in flight, Knight still had the presence of mind to retain the paper bag containing $50,000. Similarly, there can be little doubt that the murders were committed during the commission of a kidnapping. Further, as noted in the judge's sentencing order, Knight did

[12]The new standard CCP jury instruction was approved by this Court on December 7, 1995. See Standard Jury Instructions in Criminal Cases, 665 So. 2d 212 (Fla. 1995).

not challenge the applicability of this aggravator in his sentencing memorandum to the court. Hence, the finding as to three statutory aggravators is virtually undisputed.

AVOID ARREST

As we have recently reaffirmed, to support a valid avoid arrest aggravator where the victim is not a law enforcement officer, "the proof must demonstrate beyond a reasonable doubt that the victim was murdered solely or predominantly for the purpose of witness elimination." Urbin, 714 So. 2d at 416. In finding that the State had met that burden in this case, the trial court observed:

> Had the sole motive for the murders been financial gain, the defendant's purpose would have been accomplished upon the receipt of the money. Even if he had wanted to perfect his get-away he could have taken the car after he asked the Ganses to exit the vehicle and driven away. His actions clearly indicate however that he ordered them back into the car, told them to drive to an even more secluded area and executed them.

Obviously, Knight had some purpose in mind, regardless of the state of his mental faculties, in killing the victims execution style at the end of his rambling journey to a remote location. We conclude that although the issue may be contested, there is sufficient evidence, including circumstantial evidence, to support the trial court's finding. Hence, we affirm the trial court's finding of the avoid arrest aggravator. Urbin.

HAC

However, as to HAC, we conclude that the trial court's description of the victims' ordeal during the time they were being abducted up to and including the time they were murdered was largely based upon conjecture and speculation. While the trial court's speculation as to what took place may well have occurred, there simply is no evidence in the record to fill in this void in the tragic episode or to rule out other possible scenarios. There simply is no evidence of what took place between the victims and Knight during the trip in the automobile before the execution-style killings took place. Hence, we conclude that the trial court erred in finding this aggravator. However, we find the error harmless in view of the finding of five other valid aggravators.

CCP

Finally, as to CCP, the trial court cited evidence to support a finding as to all elements of that aggravator. Even if Knight did not make the final

decision to execute the two victims until sometime during his lengthy journey to his final destination, that journey provided an abundance of time for Knight to coldly and calmly decide to kill. Based on our own review of the evidence in the record, we affirm the trial court's finding of this aggravator.

MITIGATION

As to mitigation, in Chandler v. State, 702 So. 2d 186 (Fla. 1997), we reiterated the approved procedure by which trial courts must address such proffered evidence:

> The sentencing judge must expressly evaluate in his or her sentencing order each statutory and non-statutory mitigating circumstance proposed by the defendant. This evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the non-statutory mitigating circumstance is truly of a mitigating nature. A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence.

Id. at 200 (quoting Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995)). As a general matter, if the trial court conducts the proper inquiry, see Walker, 707 So. 2d at 319 (directing trial courts to conduct "a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty"), it is within its power to determine whether mitigating circumstances have been established by a preponderance of the evidence. Foster v. State, 679 So. 2d 747, 755 (Fla. 1996). On the discrete issue of expert psychological evaluations of a defendant's mental health, "expert testimony alone does not require a finding of extreme mental or emotional disturbance. Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case." Id. at 755 (citation omitted); see also Walls, 641 So. 2d at 390-91 (reasoning that opinion testimony "gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking").

In this case, the trial judge spent over twenty pages evaluating Knight's proffered mitigators. The judge resolved the conflicts in the evidence regarding the statutory mental mitigators against Knight, finding the State's expert witnesses more credible and compelling. Consequently, after devoting nine pages in analyzing the often contradictory expert testimony,

the judge found that the statutory mental mitigators had not been established. As underscored in Chandler, this is the process required by Campbell v. State, 571 So. 2d 415 (Fla. 1990), and Ferrell. See Chandler, 702 So. 2d at 201.

Moreover, because we find that the trial court properly considered and weighed all of the evidence presented, we find no error in the court's rejection of Knight's proffered statutory mental mitigators. Foster; accord Gudinas v. State, 693 So. 2d 953, 967 (Fla.) (affirming trial court's rejection of statutory mental mitigator where court concluded expert's opinion was "too heavily based upon unsupported facts"), cert. denied, 118 S. Ct. 345 (1997). While the judge found no statutory mitigators established, we also recognize that the judge found and weighed the proffered nonstatutory mitigation, including the fact that Knight suffered from "some degree of paranoia." The judge then properly exercised his discretion and determined that the nonstatutory mitigation had been established. Chandler, 702 So. 2d at 201. We find no error in the trial court's handling of the various sub-claims in this issue.

PROPORTIONALITY

In conjunction with our consideration of the previous claim, we address the issue of proportionality, as is our constitutional duty.[13] See Art. I, § 17, Fla. Const.; Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991) (identifying several state constitutional provisions which collectively mandate proportionality review in capital cases, "the purpose of which is to foster uniformity in death-penalty law"); see also Urbin, 714 So. 2d at 417 (reaffirming that "proportionality review involves consideration of 'the totality of circumstances in a case' in comparison with other death penalty cases").

After fully considering the evidence in this case as we have outlined above, we conclude that Knight's death sentences are proportional to other cases where sentences of death have been imposed. See Rolling v. State, 695 So. 2d 278 (Fla.) (affirming death sentences for multiple murders despite defendant's significant statutory and nonstatutory mental mitigation, including family's history of mental illness and defendant's physically and mentally abusive childhood), cert. denied, 118 S. Ct. 448 (1997); Henyard v. State, 689 So. 2d 239 (Fla. 1996) (affirming two death sentences despite trial court's finding of both statutory mental mitigators and nonstatutory mitigation involving defendant's stunted emotional level, low intelligence, impoverished upbringing, and dysfunctional family), cert. denied, 118 S. Ct. 130 (1997).

[13]Neither party addressed this issue in their briefs.

EXTENDED DEATH ROW INCARCERATION AS CRUEL AND UNUSUAL PUNISHMENT

Finally, Knight claims that to execute him after he has already endured more than two decades on death row is unconstitutionally cruel and unusual punishment. He also argues that Florida has forfeited its right to execute Knight under binding norms of international law. Although Knight makes an interesting argument, we find it lacks merit. As the State points out, no federal or state courts have accepted Knight's argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay. See, e.g., White v. Johnson, 79 F.3d 432 (5th Cir. 1996); State v. Smith, 931 P.2d 1272 (Mont. 1996). We also note that the Arizona Supreme Court recently rejected this precise claim. See State v. Schackart, 947 P.2d 315, 336 (Ariz. 1997) (finding "no evidence that Arizona has set up a scheme prolonging incarceration in order to torture inmates prior to their execution"), cert. denied, No. 97-9613 (U.S. Oct. 5, 1998). Second, we also consider that irrespective of the status of this case, Knight has been and will remain incarcerated on death row for his 1980 murder of Officer Burke until that case is finalized. We similarly reject Knight's claim under international law.

CONCLUSION

Accordingly, we affirm Knight's sentences of death.

It is so ordered.

SHAW, KOGAN, ANSTEAD and PARIENTE, JJ., concur.
HARDING, C.J., concurs specially with an opinion, in which OVERTON, J., concurs.
WELLS, J., concurs in part and dissents in part with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

HARDING, C.J., specially concurring.

I write separately to express my agreement with the majority's conclusion that the trial court erred in finding the heinous, atrocious, or cruel aggravating factor applicable in the instant case. I also write to explain why the instant case is distinguishable from Preston v. State, 607 So. 2d 404 (Fla. 1992), which both the sentencing order and Justice Wells cite in support of applying the HAC aggravator in this case.

As expressed in its sentencing order, the trial court concluded that the heinous, atrocious, or cruel nature of the murders committed by Knight "lies

not in the method of [the victims'] execution[-]style murder[s] but in the torturous hours that preceded them." Execution-style killings are not generally HAC unless the State has presented other evidence to show some physical or mental torture of the victim. Hartley v. State, 686 So. 2d 1316, 1323 (Fla. 1996), cert. denied, 118 S. Ct. 86 (1997). While the factual circumstances preceding the victims' killings in the instant case (being abducted at gunpoint, being coerced to withdraw money from their bank account, and being forced to drive to the remote location where they were shot) are supported by the record, the court's description of the victims' thoughts and feelings during their ordeal is based on conjecture and speculation. The sentencing order repeatedly states that the events "must have been horrifying" to the victims and that they must have anticipated "a horrible and painful death." "Speculation that the victim may have realized that the defendant[] intended more than a robbery when forcing the victim to drive to the field is insufficient to support [the HAC] aggravating factor." Hartley, 686 So. 2d at 1323-24.

In order for the HAC aggravating circumstance to apply, the murder must be both conscienceless or pitiless and unnecessarily torturous to the victim. Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). While I agree with the trial court that "common sense" tells us that almost anyone faced with a loaded weapon would experience uncertainty, confusion, and fear, these normal responses are not enough to support the HAC aggravator nor do they rise to the level of "unnecessarily torturous to the victim," without additional acts that set the crime apart from the norm of capital felonies. See, e.g., Wyatt v. State, 641 So. 2d 1336, 1340-41 (Fla. 1994) (concluding that HAC finding was proper based upon victims' "mental anguish" where defendant subjected them to twenty minutes of abuse prior to their deaths, including pistol-whipping one victim, raping the second victim, and taunting the third victim "to listen real close to hear the bullet coming" as he aimed a gun at the victim's ear); Rivera v. State, 561 So. 2d 536, 540 (Fla. 1990) (upholding HAC based upon "fear and emotional strain preceding a victim's death" where defendant abducted eleven-year-old girl, took her to a field where he sexually assaulted her, and testimony indicated that victim screamed and resisted until he was able to kill her by asphyxiation); Adams v. State, 412 So. 2d 850, 857 (Fla. 1982) (upholding HAC based upon "fear and emotional strain" preceding eight-year-old girl's death where record evidence showed that victim was "screaming" prior to death and was strangled by

defendant).

In Preston, we concluded that the victim "[u]ndoubtedly" suffered fear and terror when Preston forced her "to drive to a remote location, made her walk at knifepoint through a dark field, forced her to disrobe, and then inflicted a wound certain to be fatal." Preston, 607 So. 2d at 409. While this language might appear to support the application of the HAC aggravator in the instant case, the language of Preston must be considered within the factual circumstances of that case. The wound that Preston inflicted was "'[t]he deliberate slashing of the throat of the victim from one side to the other with the force necessary to sever the jugular veins, trachea and main arteries.'" Preston v. State, 444 So. 2d 939, 945 (Fla. 1984) (quoting from the original sentencing order).[14] This knife wound to the victim's throat resulted "in her near decapitation." 607 So. 2d at 406. The victim also sustained "multiple stab wounds and lacerations." Id.

This Court has consistently upheld the heinous, atrocious, or cruel aggravator where the victim was repeatedly stabbed. See Derrick v. State, 641 So. 2d 378, 381 (Fla. 1994); Floyd v. State, 569 So. 2d 1225, 1232 (Fla.1990); Haliburton v. State, 561 So. 2d 248, 252 (Fla.1990); Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987); Johnston v. State, 497 So. 2d 863, 871 (Fla.1986). Thus, the very nature of the attack in Preston supported the HAC finding. This was also the circumstance in many of the cases where the "fear and emotional strain preceding [the] victim's almost instantaneous death" was considered as contributing to the heinous nature of the murder. Adams, 412 So. 2d at 857 (finding that victim's murder by strangulation was HAC and noting that Court has found this method of homicide to be HAC); see also Hitchcock v. State, 578 So. 2d 685, 693 (Fla. 1990) (upholding HAC aggravator and stating that strangulations are nearly per se heinous).

If we approved the application of the HAC aggravating factor in the instant case without some factual proof of the victims' mental torture, then the factor would apply in every instance where a normal person might feel fear. This would exclude only those homicides where the victim was ambushed or killed without awareness of the assailant. This clearly would go far beyond finding the HAC factor to be "appropriate in a 'conscienceless or pitiless crime which is unnecessarily

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[14] On appeal from the denial of relief on Preston's second postconviction motion, this Court vacated Preston's death sentence and ordered resentencing. Preston v. State, 564 So. 2d 120 (Fla. 1990). Preston's prior felony conviction was set aside due to ineffective assistance of trial counsel, leaving only two of the four aggravating circumstances found by the trial court. Obviously, the factual circumstances of the wounds inflicted on the victim did not change when the original sentencing order was vacated by this Court.

torturous to the victim.'" Richardson, 604 So. 2d at 1109 (quoting Sochor v. Florida, 504 U.S. 527, 536 (1992)). I believe that such a broad interpretation of the HAC aggravating factor would render it unconstitutional because it would not provide the sentencer with adequate guidance. See Sochor, 504 U.S. at 536. Accordingly, I conclude that the HAC factor is not permissible based on the present facts and concur with the majority opinion in striking this aggravator.

OVERTON, J., concurs.

WELLS, J., concurring in part and dissenting in part.

I concur in result only with the majority's decision.

I do not concur with footnote 10 that the prosecutor's comment was "probably subject to a valid objection." Further, I do not concur in the striking of HAC, and I believe under these facts that HAC is supported by competent, substantial evidence and that the application of the aggravator is consistent with this Court's decision in Preston v. State, 607 So. 2d 404 (Fla. 1992).

To conclude that this ordeal, which lasted several hours, did not provide factual proof of the victims' mental torture means that our law has to ignore the obvious and defy common sense and human experience. I do not believe our law has to do this, and I will not.

While I agree that the length of time Knight has been on death row does not create a constitutional impediment to his execution, I do again state my view that such an extended time period to finally adjudicate these cases is totally unacceptable and is this Court's and the State's prime responsibility to correct. See Elledge v. Florida, 67 U.S.L.W. 3256 (U.S. Oct. 13, 1998) (No. 98-5410) (Breyer, J., dissenting). The murders in this case were committed in July 1974; Knight was convicted of the murders in April 1975. The courts and the State must be able to do better, and any explanation of why we are unable to do so is insufficient.

An Appeal from the Circuit Court in and for Dade County

Rodolfo Sorondo, Jr., Judge -
Case No. F74-5978

Bennett H. Brummer, Public Defender, and Louis Campbell, Assistant Public Defender, Eleventh Judicial Circuit, Miami, Florida,

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No. 98-9741

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

THOMAS KNIGHT,
N/K/A ASKARI ABDULLAH MUHAMMAD,

Petitioner,

-vs-

FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of Petitioner's Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari have been served on counsel for Respondent by first-class U.S. mail addressed to: Assistant Attorney General Fariba N. Komeily and Assistant Attorney General Richard Martell, Office of the Attorney General, Riv e Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida, 33131, this 20th day of August, 1999.

Beth C. Weitzner
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

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N/K/A ASKARI ABDULLAH MUHAMMAD,

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-vs-

FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of Petitioner's Petition for Writ of Certiorari and Motion to Proceed *In Forma Pauperis* have been served on counsel for Respondent by first-class U.S. mail addressed to: Assistant Attorney General Fariba N. Komeily, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida, 33131, this 9th day of June, 1999.

Beth C. Weitzner
BETH C. WEITZNER
Assistant Public Defender
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ORIGINAL (4)

IN THE UNITED STATES SUPREME COURT

October 1998 Term

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THOMAS KNIGHT,
n/k/a Askari Abdullah Muhammed

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED (Restated)

I. WHETHER CERTIORARI RELIEF AS TO CLAIM OF DELAY SHOULD BE DENIED WHERE THE PETITIONER BENEFITTED FROM THE DELAY, AND NO CONFLICT WITH ANY OF THIS COURT'S OR ANY OTHER COURT'S PRECEDENTS HAS BEEN DEMONSTRATED.

II. WHETHER CERTIORARI REVIEW SHOULD BE DENIED WHERE THE STATE COURT'S HOLDING WAS IN ACCORDANCE WITH THIS COURT'S PRIOR PRECEDENTS, AND DID NOT INCREASE OR CHANGE THE SENTENCE FOR THE CRIMES HEREIN.

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CITATIONS TO OPINION BELOW

The decision from which the petitioner seeks to invoke the discretionary review of this Court is reported as 721 So. 2d 287 (Fla. 1998), rehearing denied and revised opinion issued, 24 Fla. L. Weekly S135 (Fla. March 11, 1999).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. s. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The issues presented in this capital case involve the Eighth and Fourteenth Amendments, as well as Article I, section 10 of the United States Constitution.

STATEMENT OF THE CASE AND FACTS

t case arises from direct appeal in the Florida

which affirmed the 1996 resentencing of the

ıth for the 1974 murders of Sydney and Lillian Gans.

reme Court found the following historical facts of

appeal, we related the following material facts:

> .ng at his place of business and parking in his space, Mr. Gans was approached by the who was carrying an automatic rifle and was -enter his automobile, to drive home and get and to drive to the bank and get $50,000. de the bank, Mr. Gans informed the president abduction. The police and FBI were alerted. ıen returned to his car with the money. He and shortly thereafter, were found shot to death, shots -- perforating through their necks -- n fired from the rear seat of the vehicle. Knight was apprehended and taken into custody l area about 2,000 feet from the Gans' vehicle. him buried in the dirt was an automatic rifle r bag containing $50,000. There were blood ıis pants.

8 So. 2d at 202. During the resentencing BI Agent Terry Nelson testified that he was .n all stages of the surveillance of the ısode. He arrived at City National Bank in an ır, and observed the Gans' Mercedes, with Mrs. g and a black male with a rifle across his lap the right rear. After Mr. Gans returned to ıe vehicle departed and followed a circuitous e heading toward an unpopulated area of south /.

ntarily lost sight of the Mercedes, and after contact, Nelson again lost sight of the

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arrest, §921.141(5)(e); (4) the murders were committed for pecuniary gain, §921.141(5)(f); (5) the murders were especially heinous, atrocious, or cruel (HAC), §921.141(5)(h); and (6) the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP), §921.141(5)(I). The trial court considered and rejected Knight's proffered statutory mental mitigators. In nonstatutory mitigation, the trial court found and gave weight to the fact that Knight was a victim of childhood abuse; that he suffered from some degree of paranoia; and that he was raised in poverty. Knight v. State, 721 So. 2d at 302 n.1.

With respect to the CCP aggravating factor, at issue in the instant proceedings, the trial judge had further found that, "even in the absence of this aggravating circumstance, the court's analysis and conclusions herein would not change." (S.R. 11, n.9). The trial judge had further concluded that: "The aggravating circumstances in this case far outweigh the mitigating circumstances. The mitigating factors pale when compared to the aggravators herein." (S.R. 38).

On direct appeal, the Florida Supreme Court affirmed the sentences of death, having invalidated the HAC circumstance but finding the error to be harmless beyond a reasonable doubt. 721

So. 2d at 298-99. With respect to the claim as to the CCP aggravator before this Court, the Florida Supreme Court held: "As Knight acknowledges, we have previously determined that application of the CCP aggravator in this situation is not an ex post facto violation. Combs v. State, 403 So. 2d 418 (Fla. 1981)." 721 So. 2d at 297.

With respect to the first claim of delay in execution raised in the instant proceedings, it should be noted that Petitioner was first tried, convicted of the instant crimes, and sentenced to death in 1975. 721 So. 2d at 302. The Florida Supreme Court affirmed the convictions and sentences on direct appeal in 1976. Knight v. State, 338 So. 2d 201 (Fla. 1976). Thereafter, the Petitioner filed a state petition for writ of habeas corpus, raising ineffective assistance of appellate counsel issues. 721 So. 2d at 290. The petition was denied, upon a finding that appellate counsel had not been ineffective. Knight v. State, 394 So. 2d 997 (Fla. 1981).

In the interim, Petitioner also fatally stabbed a prison guard, Officer James Burke, while on death row, on October 12, 1980. Petitioner, having been denied a visitor's pass for failure to follow prison regulations, had announced that he would have to start "sticking people." Petitioner had then stabbed Burke, who

had no prior involvement with him, with a knife made from a sharpened serving spoon. Petitioner was convicted and sentenced to death for this crime as well. The conviction and sentence of death were affirmed by the Florida Supreme Court on direct appeal. Muhammad v. State, 494 So. 2d 969, 970 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987).

After the Governor signed a warrant for the Gans murders, Knight filed a federal habeas petition and a motion for stay of execution in the federal district court. The district court granted the stay, retained jurisdiction on the habeas petition, and ordered Knight to exhaust his state law claims. 721 So. 2d at 290. Petitioner thus filed a motion for post-conviction relief in the state trial court which was summarily denied, and on appeal the denial was affirmed. Muhammad v. State, 426 So. 2d 533 (Fla. 1982), cert. denied, 464 U.S. 865, (1983). In said post-conviction proceedings, the Petitioner had raised six (6) issues with respect to the guilt phase, two (2) issues with respect to the penalty phase - that the imposition of the death penalty was racially discriminatory and arbitrary, and ineffective assistance of trial counsel issues. 426 So. 2d at 535-36. Petitioner then returned to the federal district court. That court also denied his claims, after conducting an evidentiary hearing. Knight v. Dugger, 863 F. 2d 705, 707 (11th Cir. 1988).

In the interim between the district court's denial of habeas relief and the Petitioner's appeal of that denial to the Eleventh Circuit Court of Appeals, this Court issued its decision in Hitchcock v. Dugger, 481 U.S. 393 (1987). Knight v. Dugger, 863 F. 2d at 708. In Hitchcock, this Court invalidated Florida's standard jury instructions with respect to nonstatutory mitigation during the penalty phase. The Eleventh Circuit Court of Appeals thus affirmed denial of habeas relief with respect to every post-conviction claim raised by the Petitioner, but reversed the sentence of death based upon the change of law in Hitchcock. Knight v. Dugger, 865 F. 2d at 759 (Clark, J., specially concurring)("We reverse only with respect to the Hitchcock issue. The law governing Florida's jury instructions on nonstatutory mitigating circumstances has changed since the district court's opinion and judgment. This necessitates reversal.").

Resentencing proceedings thus began in the state trial court. The Petitioner, aside from litigating a multitude of issues, took several continuances on various grounds prior to the 1996 resentencing. Immediately prior to the commencement of resentencing, the Petitioner then filed a motion to preclude the death penalty on the ground of delay. The Petitioner claimed that, the "14 year" delay between the original 1975 trial and the reversal based upon Hitchcock in 1989, was attributed to the State.

On this basis, the Petitioner claimed that his execution, after he has been incarcerated for more than 20 years, was cruel and unusual punishment, in reliance upon Lackey v. Texas, 514 U.S. 1045 (1995) (memorandum of Stevens, J., with respect to denial of certiorari). He relied upon the "inherent suffering" of incarceration under a death sentence and, that retribution and deterrence purposes are no longer served. No factual circumstances pertaining to the Petitioner's own situation on death row nor any particularized suffering by Petitioner were presented. The trial court thus summarily rejected the claim. On direct appeal, the Petitioner raised the same claim which was rejected by the court below on the grounds that, (a) the claim of delay, where both parties were responsible for delays, had been rejected by every court that had previously considered it; and, (b) Petitioner was not entitled to relief, even if the claim was meritorious, as Petitioner was subject to another separate and valid death sentence for the Burke murder:

> Finally, Knight claims that to execute him after he has already endured more than two decades on death row is unconstitutionally cruel and unusual punishment. He also argues that Florida has forfeited its right to execute Knight under binding norms of international law. Although Knight makes an interesting argument, we find it lacks merit. As the State points out, no federal or state courts have accepted Knight's argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay. *See, e.g., White v. Johnson*, 79 F. 3d 432 (5th Cir. 1996); *State v. Smith*, 280 Mont. 158, 931 P.2d 1272 (Mont. 1996). We also note that the Arizona Supreme Court recently rejected this

precise claim. *See State v. Schackart*, 190 Aria. 238, 947 P.2d 315, 336 (Ariz. 1997) (finding "no evidence that Arizona has set up a scheme prolonging incarceration in order to torture inmates prior to their execution"), *cert. denied*, ___ U.S. ___, 119 S.Ct. 149, ___ L. Ed. 2d ___ (1998). Second, we also consider that irrespective of the status of this case, Knight has been and will remain incarcerated on death row for his 1980 murder of officer Burke until that case is finalized. We similarly reject Knight's claim under international law.

721 So. 2d at 300.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI RELIEF AS TO CLAIM OF DELAY SHOULD BE DENIED WHERE THE PETITIONER BENEFITTED FROM THE DELAY, AND NO CONFLICT WITH ANY OF THIS COURT'S OR ANY OTHER COURTS' PRECEDENTS HAS BEEN DEMONSTRATED.

The Petitioner's claim of delay, as presented to the state courts, was properly rejected on the grounds that: (a) where both parties are responsible for delays, the Eighth and Fourteenth Amendment challenges herein have been rejected by every court which has addressed the issue; and, (b) Petitioner would not be entitled to relief, even if the claim was meritorious, as he is subject to another separate and valid death sentence for the Burke murder. Knight v. State, 721 So. 2d at 300. The lower court relied upon the well reasoned decisions of federal and state courts which have rejected Petitioner's claims. See McKenzie v. Day, 57 F.3d 1461, 1466-67 (9th Cir.), adopted en banc, 57 F. 3d 1493 (9th Cir. 1995), cert. denied, (1995) (delay in carrying out execution benefits inmates and is, "a consequence of our evolving standards of decency, which prompt us to provide death row inmates with ample opportunities to contest their convictions and sentences."); see also Chambers v. Bowersox, 157 F.3d 560, 570 (8th Cir. 1998), cert.denied, 119 S.Ct. 2383 (1999) ("But delay, in large part, is a function of the desire of our courts, state and federal, to get it right, to explore exhaustively, or at least sufficiently, any

argument that might save someone's life. Chambers's strongest argument is that the State has had to try him three times before getting it right. That is true, but there is no evidence, not even a claim, that the State has deliberately sought to convict Chambers invalidly in order to prolong the time before it could secure a valid conviction and execute him. We believe the State has been attempting in good faith to enforce its laws. Delay has come about because Chambers, of course with justification, has contested the judgments against him, and, on two occasions, has done so successfully. . . . we do not see how the present situation even begins to approach a constitutional violation. Petitioner's argument is without merit."); White v. Johnson, 79 F.3d 432, 439 (5th Cir. 1996), cert. denied, 519 U.S. 911,(1998) (same); Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir. 1995), cert. denied, 515 U.S. 117 (1995) (same).

Likewise, the state courts have also rejected the claim, holding: "[i]f an Eighth Amendment challenge based on delay were to prevail, then the procedures designed to provide a fair adjudication in death penalty cases would in themselves be used to ultimately defeat their own purposes." State v. Smith, 931 P.2d 1272, 1288 (Mont. 1996), cert. denied, 118 S. Ct. 410 (1997); see also Ex Parte Bush, 695 So. 2d 138, 139-40 (Ala.), cert. denied, 118 S. Ct. 418 (1997); Arizona v. Schackart, 947 P.2d 315, 336 (Ariz. 1997)(en banc), cert. denied, 119 S. Ct. 149 (1998); Hill v.

State, 962 S.W.2d 762, 767 (Ark.), cert. denied, 119 S. Ct. 145 (1998); People v. Frye, 959 P.2d 183, 262-64 (Cal. 1998), cert. denied, 119 S. Ct. 1262 (1999); State v. Moore, 591 N.W.2d 86, 93-95 (Neb. 1999); State v. Chinn, 1997 WL 464736 (Ohio Ct. App. 1997); Bell v. State, 938 S.W.2d 35, 53 (Tex. Crim. App. 1996), cert. denied, 118 S. Ct. 90 (1997). The courts have also rejected claims with respect to the deterrent effect of the death penalty after a long delay. State v. Smith, 931 P.2d at 1288 ("The United States Supreme Court has recognized, however, that 'the value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures.' Gregg, 428 U.S. at 186."). Accordingly, certiorari relief is not appropriate with respect to the instant claims as no conflict with any of this Court's precedents, nor with any federal or other state courts' precedents has been demonstrated. Moreover, adjudication of the claim would not even benefit the Petitioner, as he is subject to another separate and valid sentence of death for the murder of a corrections officer while on death row.

The Petitioner's original trial and sentencing took place in 1975. He successfully obtained federal habeas corpus relief on appeal, based only upon the change of law in Hitchcock v. Dugger, 481 U.S. 393 (1987), from the Eleventh Circuit Court of Appeals in 1989. See Knight v. Dugger, 863 F.2d 705 (1988). It should be

noted that after the completion of direct appeal proceedings in 1976, the Petitioner had pursued multiple state post-conviction proceedings and filed a federal petition for writ of habeas corpus, raising in large part ineffective assistance of trial and appellate counsel claims.[1] All of the state courts and the federal District Court denied relief on said claims. After the denial of federal habeas relief by the District Court in 1987, this Court issued its opinion in Hitchcock v. Dugger, 481 U.S. 393 (1987), which invalidated Florida's prior standard jury instructions with respect to consideration of non-statutory mitigating factors. The Eleventh Circuit, on appeal from denial of habeas relief from the District Court, affirmed all of the ineffective assistance of counsel claims previously pursued by the Petitioner. The federal court of appeals reversed the case for resentencing based only upon the change of law in Hitchcock. 865 F.2d at 759 (Clark, J., specially concurring) ("We reverse only with respect to the Hitchcock issue. The law governing Florida's jury instructions on non-statutory mitigating circumstances has changed since the district court opinion and judgment. This necessitates reversal").[2]

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[1] See Knight v. State, 394 So. 2d at 997-1003; Muhammad v. State, 426 So. 2d at 533-39; Knight v. Dugger, 863 F.2d at 710-758.

[2] See also Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987)("We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its Hitchcock opinion represents a sufficient change in the law..., to defeat the claim of a procedural default.").

In the state courts, the Petitioner then claimed that, the "14 year" delay between the original 1975 trial and the reversal based on Hitchcock in 1989, was attributable to the state. On this basis, the Petitioner claimed that his execution, after he has been incarcerated for more than 20 years, was cruel and unusual punishment, in reliance upon Lackey v. Texas, 514 U.S. 1045 (1995)(memorandum of Stevens, J. respecting denial of certiorari). He relied upon the "inherent suffering" of incarceration under a death sentence and, that retribution and deterrence purposes are no longer served. As noted previously, no factual premise pertaining to the circumstances of Petitioner's own incarceration or suffering were presented to the state courts. Thus, to the extent that Petitioner may be relying on such circumstances,[3] said claim was not fairly presented to the state court and is thus not a proper basis for certiorari relief. See Street v. New York, 394 U.S. 576, 582-83 (1969) (where an issue is not presented to state courts in such a manner that it was necessarily decided by the highest state court, the United States Supreme Court would not consider the issue); Taylor v. Freeland & Kronz, 503 U.S. 638, 645 (1992)("In addition, we have said that 'ordinarily, this Court does not decide questions not raised or resolved in the lower court[s].' Youakim v. Miller, 425 U.S. 231, 234, 47 L. Ed. 2d 701, 96 S. Ct. 1399 (1976)(per curiam). These principles help to maintain the

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[3] See petition at pp. 17-20.

integrity of the process of certiorari.");[4] see also Janecka v. Texas, 937 S.W.2d 456, 476 (Tex. 1997) (en banc), cert. denied, 118 S. Ct. 86 (1997) (Eighth Amendment claim based upon 15-year delay and attendant "psychological stress" deemed to be waived for failure to establish a factual predicate in the trial court).

With respect to the merits of the claim, as presented to the state courts, the lower court relied upon the well reasoned precedent in State v. Smith, 931 P.2d at 1287-88, which includes a

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[4] As noted previously, Petitioner's claim of delay herein was first presented, ore tenus, immediately prior to the resentencing. (T. 7-13). The written motion with respect to said claim was filed after the commencement of resentencing, on February 7, 1996. (R. 1436-58). No factual premise with respect to Petitioner's own physical or psychological circumstances on death row were related or relied upon in either the oral or written presentation of the instant claim. Id. No evidence with respect to the "X wing," now relied upon by the Petitioner, was presented. Id. Indeed, contrary to the Petitioner's representations herein, the record, in the context of other claims not at issue herein, reflects that the Petitioner did not have extensive disciplinary problems when he was first placed on death row for the Gans murders in 1975. It was after the Petitioner murdered corrections officer Burke, while on death row, in October, 1980, that Petitioner was placed in "Q wing" (secure solitary confinement). (T. 3535-37; 2270-71). Petitioner was taken out of Q wing and placed with regular death row inmates in 1989, more than 7 years prior to the resentencing. (T. 3536). It should be noted that, apart from the Burke murder, Petitioner had amassed 543 disciplinary reports; the average number of disciplinary reports for a death row inmate in a ten (10) year period was "5 or 6." (T. 3537; 3549-50). In any event, again contrary to the Petitioner's claim herein, the record further reflects that while on death row with other such inmates prior to resentencing, the Petitioner had a television in addition to regular access to legal, religious and fictional literature in his cell. (T. 3538-39). He also regularly played chess with other inmates (T. 3539-40), and had yard privileges. (T. 2296).

comprehensive summary of the legal landscape in rejecting the claim, as follows:

> At the time of the oral argument in this appeal, Smith had spent approximately thirteen years on death row and had four sentencing hearings. In arguing that his execution after such a long period of incarceration would amount to cruel and unusual punishment, he relies on Lackey v. Texas, 514 U.S. 1045, 115 S. Ct. 1421. 131 L.Ed. 2d 304 (1995).
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> Justice Stevens' memorandum in connection with the Court's denial of certiorari cannot be construed as a controlling decision on this issue and has not been regarded favorably in the federal courts. In McKenzie v. Day, 57 F.3d 1461, adopted en banc, 57 F.3d 1493 (9th Cir. 1995), Duncan McKenzie attempted to obtain a stay of his execution by showing the likely success of his claim that the twenty-year delay in his execution was cruel and unusual. The Ninth Circuit Court of Appeals denied the stay of execution. The court stated, "we conclude that it is highly unlikely that McKenzie's Lackey claim would be successful if litigated to its conclusion." McKenzie, 57 F.3d at 1467. The court reasoned that the cause for the delay in carrying out McKenzie's sentence was that "McKenzie has availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances." McKenzie, 57 F.3d at 1466-67. Thus, the court reasoned, the delay was "a consequence of our evolving standards of decency, which prompt us to provide death row inmates with ample opportunities to contest their convictions and sentences." McKenzie, 57 F.3d at 1467. The court recognized the ultimate irony and lack of logic in the Lackey claim: If an Eighth Amendment challenge based on delay were to prevail, then the procedures designed to promote fair adjudication in death penalty cases would in themselves be used to ultimately defeat their own purpose. See also White v. Johnson, 79 F.3d 432 (5th Cir. 1996), and Stafford v. Ward, 59 F.3d 1025 (10th Cir. 1995).

In White, the Fifth Circuit Court of Appeals reasoned:

> [T]here are compelling justifications for the delay between conviction and the execution of a death sentence. The state's interest in

> deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards. As a result, states allow prisoners such as White to challenge their convictions for years. White, 79 F.3d at 439.

It is clear from the record in this case that Smith has benefitted from the appellate and federal review process of which he has availed himself and which has resulted in the delay and the multiple sentencing hearings in this case. We hold that Smith has not established violation of his right to due process or his right to be free from cruel and unusual punishment as a result thereof.

Smith further argues that imposition of the death penalty after a long delay cannot have any deterrent effect. The United States Supreme Court has recognized, however, that "the value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures." Gregg, 428 U.S. at 186, 96 S.Ct. at 2931. Accordingly, this argument should be presented to the Montana Legislature, not to this Court.

See also White v. Johnson, 79 F.3d at 437 ("As a panel of this Court noted in Fearance v. Scott, federal courts have encountered the claim that prolonged incarceration before execution is cruel and unusual punishment for decades. [cite omitted]. To date, no federal court has recognized such a theory of cruel and unusual punishment."); Chambers, 157 F. 3d at 570; Ex Parte Bush, 695 So. 2d at 139-40; Frye, 959 P.2d at 262-64; Moore, 591 N.W. 2d at 93-95; Chinn, 1997 WL 464736 at *1-2; Bell, 938 S.W. 2d at 53.

In the instant case, the 14 year delay between the original conviction and sentence of death in 1975 and the reversal for

resentencing by the Eleventh Circuit Court of Appeals in 1989, benefitted the Petitioner. He obtained relief based upon the change of law in Hitchcock which occurred in 1987. Moreover, the argument that the imposition of the death penalty after a long delay does not have any deterrent effect, is also without merit, as that is an issue to be resolved by the legislatures and not the courts. As recognized by this Court, "the value of capital punishment as deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures." Gregg v. Georgia, 428 U.S. 153, 186 (1976). Thus, as noted previously, no conflict with any precedent from this Court or other federal and state courts has been demonstrated. Additionally, the Petitioner is under another separate and valid sentence of death for the Burke murder. The Respondent thus respectfully submits that certiorari relief should be denied.

II.

CERTIORARI REVIEW SHOULD BE DENIED WHERE THE STATE COURT'S HOLDING WAS IN ACCORDANCE WITH THIS COURT'S PRIOR PRECEDENTS, AND DID NOT INCREASE OR CHANGE THE SENTENCE FOR THE CRIMES HEREIN.

Petitioner argues that the use of the amended aggravating factor of cold, calculated and premeditated (CCP) at his resentencing constitutes an ex post facto application of the law. The Respondent respectfully submits that certiorari review is not

appropriate with respect to this claim, as the state court's rejection of Petitioner's argument is in conformity with the well established precedents of this Court. See Collins v. Youngblood, infra; California Department of Corrections v. Morales, infra; Lynce v. Mathis, infra. The use of the complained of amended aggravator neither increased nor made more burdensome the punishment for Petitioner's crimes, so as to constitute an ex post facto violation. Moreover, the record herein affirmatively reflects that the result of the resentencing in the instant case would have been the same even absent the complained of amended aggravator. The Petitioner was sentenced to death previously without the use of the complained of aggravator herein. At resentencing, the sentencer, having found four (4) other valid aggravators, expressly held that, "even in the absence of this aggravating circumstance [CCP], the court's analysis and conclusions herein would not change." (SR. 11, n. 9).[5]

In Collins v. Youngblood, 497 U.S. 37, 50-51 (1990), this

[5] Apart from the complained of aggravator herein, the trial court found the following four (4) aggravators applicable: 1) prior violent felonies - the unrelated murder of corrections officer Burke, in addition to the contemporaneous double murder herein; 2) murder committed during the course of a kidnaping; 3) murder committed to avoid arrest; and, 4) murder committed for pecuniary gain. The trial court found three nonstatutory mitigating factors: 1) defendant was abused as a child; 2) he suffers from some degree of paranoia; and, 3) defendant was raised in poverty. The trial court concluded that: "the mitigating factors pale when compared to the aggravators herein." (SR2-38).

Court reviewed its ex post facto jurisprudence, overturned two of its precedents, Kring v. Missouri, 107 U.S. 221 (1883) and Thompson v. Utah, 170 U.S. 343 (1898), and cited with approval the formulation in an earlier decision, Beazell v. Ohio, 269 U.S. 167 (1925):

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto. Id. at 169-170, 46 S. Ct. at 68-69."
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> . . .
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> The Beazell formulation is faithful to our best knowledge of the original understanding of the Ex Post Facto clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts.

497 U.S. at 42-43; see also California Dept. Of Corrections v. Morales, 514 U.S. 499, 506 n.3 (1995) ("After Collins, the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable"); Lynce v. Mathis, 519 U.S. 433, 441 (1997) (for a law to "fall within the *ex post facto* prohibition . . . it 'must disadvantage the offender affected by it' by altering the definition of criminal conduct or

increasing the punishment for the crime.").

In the instant case, Petitioner's challenged statutory provision neither punished as a crime an act previously done which was innocent when done, nor made more burdensome the punishment for a crime after its commission, nor did it deprive one charged with crime of any defense available at the time when the act was committed.

The state court below, in rejecting the Petitioner's claim of ex post facto violation, relied upon its prior precedent in Combs v. State, 403 So. 2d 418 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). Knight v. State, 721 So. 2d at 297. The state court in Combs construed Florida's capital sentencing statute in effect at the time of the commission of the crimes herein, to have encompassed and authorized the consideration of the factual circumstances and elements of the crime, including the cold, calculated and premeditated mode of commission of the crimes, at issue herein. The state court had thus held that the subsequent amendment of the statutory scheme to include a specific aggravating factor of "cold, calculated, premeditated" circumstance did not constitute the addition of a "new" aggravating factor, but that the amendment merely inured to the benefit of the defendant by adding limitations to the use of the elements of the crime for

aggravation purposes:

> We find no error in the application of section 921.141(5)(I), Florida Statutes, which became effective July 1, 1979, adding as an aggravating circumstance:
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> > (I) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
> >
> > If the legislature had added an entirely new factor as an aggravating circumstance, then retroactive consideration would have violated the prohibition against ex post facto laws as set forth in Weaver v. Graham, --- U.S. ---, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), and in State v. Williams, 397 So. 2d 663 (Fla. 1981). However, the addition by the legislature of paragraph (I) to section 921.141(5), in fact only reiterates in part what is already present in the elements of premeditated murder, with which petitioner was charged and which the evidence clearly supports. Although consideration of aggravating factors must be limited to those set forth in ye statute, Elledge v. State, 346 So. 2d 998 (Fla. 1977); Purdy v. State, 343 So. 2d 4 (Fla.), cert. denied, 434 U.S. 847, 98 S. Ct. 153, 54 L. Ed. 2d 114 (1977); the elements of the specific offense charged are and must be inherently part of the circumstances taken into consideration when imposing a sentence in a capital case as well as in other criminal cases. As Justice Adkins stated in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1951, 40 L. Ed. 2d 295 (1974):
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> > The aggravating circumstances . . . actually define those crimes when read in conjunction with Fla. Stat. ss 782.04(1) (homicide statute) and 794.01(1) (former rape statute), F.S.A. to which the death penalty is applicable in the absence of mitigating circumstances.
> >
> > What, then, does paragraph (I) add to the

> statute? In our view, it adds the requirement that in order to consider the elements of a premeditated murder as an aggravating circumstance, the premeditation must have been "cold, calculated and . . . without any pretense of moral or legal justification." Paragraph (I) in effect adds nothing new to the elements of the crimes for which petitioner stands convicted but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant.

Combs, 403 So. 2d at 421 (emphasis added). The Florida Supreme Court reaffirmed its position that the "cold, calculated, premeditated" aggravating factor, "did not change the substance of the sentencing law to the detriment of capital offenders," in Justus v. State, 438 So. 2d 358, 368 (Fla. 1983), cert. denied, 465 U.S. 1052 (1984); see also Zeigler v. State, 580 So. 2d 127, 130 (Fla.), cert. denied, 502 U.S. 946 (1991); Sireci v. State, 587 So. 2d 450, 454 (Fla. 1991), cert. denied, 503 U.S. 946 (1992) (same); Hall v. State, 614 So. 2d 473, 478 (Fla.), cert. denied, 510 U.S. 834 (1993) (same); Trotter v. State, 690 So. 2d 1234, 1237 (Fla. 1996), cert. denied, 522 U.S. 876 (1997) (enactment of community control/custody aggravator was not a substantive change in law and did not constitute an ex post facto violation, where community control addition merely refined the previously existing sentence of imprisonment aggravator).

In support of the above position, the Respondent would additionally note that another statutory aggravating circumstance,

heinous, atrocious and cruel (HAC), which was in effect at the time of the commission of the instant crimes, also specifically encompassed and included, a "cold, calculated design to kill," at the time. Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). The Florida Supreme Court, with respect to crimes committed at the time of the instant crimes and prior to the enactment of the CCP aggravating factor in 1979 at issue herein, had expressly held that the HAC aggravating circumstance in effect at the time applied to killings "inflicted in a 'cold and calculating' or 'execution-style' fashion." Vaught v. State, 410 So. 2d 147, 151 (Fla. 1982), (citing Magill v. State, 386 So. 2d 1188 (Fla. 1980), cert. denied, 450 U.S. 927 (1981)); Alvord v. State, supra; and, Sullivan v. State, 303 So. 2d 632 (Fla. 1974), cert. denied, 428 U.S. 911 (1976).[6]

The enactment of the cold, calculated, premeditated circumstance as a separate aggravating factor in 1979 then merely led to limitations in the consideration of the factual circumstances of the crime in aggravation. Thus, as noted by the Petitioner, this aggravating factor at the time of the resentencing

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[6] The State would note at the original trial herein, the HAC aggravator was applied and upheld on appeal. Knight v. State, 338 So. 2d at 208. At the resentencing, despite having characterized the crimes as "execution-style killings," the Court below invalidated the application of the HAC aggravator in light of the limitations to the HAC factor which had occurred since the time of the original trial. Knight v. State, 721 So. 2d at 299.

required considerably more than what was required at the time of the original trial. See Jackson v. State, 648 So. 2d 85, 89 (Fla. 1996), petition at p. 29. The limitations inured to the benefit of the defendant.

In sum, the "cold, calculated design" or "execution-style" of committing the crime, was permissible aggravation in the statutory scheme in effect at the time of the commission of the instant crimes. The subsequent amendment of the statute to include a separate aggravator of "cold, calculated, premeditated" circumstance, merely led to additional judicial limitations which inured to the defendant's benefit. As such, there was no ex post facto violation, as the amendments did not affect the definition of the crimes herein or the punishment therefore, in conformity with this Court's prior precedents. Certiorari relief should thus be denied.

CONCLUSION

Based on the foregoing, the Respondent respectfully requests that this Honorable Court deny the petition for writ of certiorari.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONSE TO PETITION FOR A WRIT OF CERTIORARI** was furnished by U.S. Postal Service, first class mail, postage prepaid, to **BETH C. WEITZNER, and LOUIS CAMPBELL** Assistant Public Defenders, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida 33125 on the 10th day of August, 1999.

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ORIGINAL

Supreme Court, U.S.
FILED
AUG 20 1999
CLERK

No. 98-9741

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

THOMAS KNIGHT,
N/K/A ASKARI ABDULLAH MUHAMMAD,

Petitioner,

-vs-

FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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No. 98-9741

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

**THOMAS KNIGHT,
N/K/A ASKARI ABDULLAH MUHAMMAD,**

Petitioner,

-vs-

FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner Thomas Knight, now known as Askari Abdullah Muhammad, submits this reply to Respondent's brief in opposition to Petitioner's certiorari petition.

I.

RESPONDENT ERRS IN CONTENDING THAT NO FACTUAL PREMISE PERTAINING TO THE CIRCUMSTANCES OF PETITIONER'S OWN INCARCERATION OR SUFFERING WAS PRESENTED TO THE STATE COURTS.

Regarding petitioner's claim that execution after more than two decades on death row would be unconstitutional, the respondent asserts that "no factual premise pertaining to the

circumstances of Petitioner's own incarceration or suffering were presented to the state courts" and that the claim was therefore not fairly presented below. (Response at 14; see also Response at 15 footnote 4). The respondent's assertion is incorrect: The petitioner's written motion alleged both suffering and an exacerbation of his mental illness as a result of his prolonged incarceration on death row (R. 1441-43); at the time the motion was ruled upon, the court had heard extensive evidence concerning the circumstances and conditions of incarceration; and the court's unexplained denial of the motion was certainly not based on any insufficiency of that allegation or of the evidence to support it, since the court subsequently found that the mental impact of the years on death row had been "devastating" (R. 1540-41).

The petitioner's motion to preclude imposition of the death penalty because of the excessive delay was initially presented (with leave of court) as an ore tenus amendment to another motion before the resentencing proceeding began. (T. 3-17). It was renewed, in writing, on February 7, 1996, after all the evidence had been presented to the jury, and was considered and denied during the charge conference which took place on that day. (R. 1436-58; T. 3740-41). The evidence presented included testimony and exhibits regarding the circumstances and conditions of Mr. Muhammad's incarceration on death row, both when he was on regular death-row status and when he was in the special isolation unit. (T. 2235-59, 2270-71, 2295-97, 2314-15, 3534-50). There was also expert witness testimony (some of it elicited by the state in cross-examination) regarding the effect of such conditions upon

the prisoner's mental state. (T. 2572-73, 2579-80, 2593-94).[1]

In the written motion filed on February 7, 1996, the petitioner did argue (as he does now) that prolonged incarceration under a sentence of death involves inherent cruelties.[2] He also suggested that an objective standard (rather than the subjective suffering of a particular inmate) should be used to determine whether prolonged incarceration on death row is cruel and unusual. However, he also alleged that he had indeed suffered while on death row and that his mental illness had been "exacerbated as a result of being subjected to the terrible stress and mental anguish that is a daily part of life under a sentence of death." (R. 1441-43).

The sentencing judge did not explain why he denied either the initial motion or the renewed motion (T. 13, 3741). It certainly was not because of an insufficiency in the

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[1]Contrary to what the respondent appears to suggest (Response at 15 n. 4), there was considerable evidence about the complete isolation which Mr. Muhammad endured for several years in what the court described as "punitive solitary confinement" (R. 1540). Among other things the evidence showed the following: The cell was completely enclosed (T. 3536), there was no television (T. 3547), there were no yard privileges (T. 2296), the door was opened only a few times a day, for a minute or two (T. 3548). The only human contact was, in the trial court's words, "the occasional check by a corrections officer." (R. 1540).

Since, as appears from the respondent's own brief, there is no dispute that Mr. Muhammad was in fact held for years in a special isolation unit, or that evidence was presented in this regard, the respondent's assertion that "[n]o evidence with respect to the 'X wing,' now relied upon by the Petitioner was presented" (Response at 15 n. 4), apparently reflects only a quarrel about the unit's name. Petitioner does not disagree that, as he stated in the petition, that unit was known as "Q Wing" at the time Mr. Muhammad was held there.

[2]In support he cited the statements and opinions of numerous jurists, legal commentators, and mental health experts. (R. 1441-43).

allegation of personal suffering or in the evidence to support it. The judge subsequently found that the years on death row had detrimentally affected the defendant's mind, and used that conclusion as a basis for discounting the testimony of several of the defense expert witnesses regarding the defendant's mental state at the time of the crimes. (R. 1540-41). In his sentencing order, the judge found that the impact upon the mind of prolonged incarceration in the "austere conditions" and "relative isolation" of death row, and the even more severe isolation of what was then known as Q Wing, must have been "devastating." (R. 1540). So devastating was that impact, in fact, that the judge felt that the opinions of experts who had seen Mr. Muhammad after he had been five or more years on death row could not be relied upon in assessing the applicability of the statutory mental mitigators[3]. As explained by the judge in his sentencing order:

> In considering the testimony of [defense expert witnesses] Drs. Fisher, McClaine, Carbonell and Toomer the court notes not only the passage of time between the day of the crimes and the day of the evaluations, but also the effect that time must have had on the defendant's state of mind. When Dr. Fisher first saw the defendant in 1979 the defendant had been in the relative isolation of death row for five (5) years. It is difficult to imagine what living under such circumstances must be like. But it would be unreasonable to believe that such austere conditions as exist there would not have a significant impact on a man's mind. By the time Dr. Fisher and Dr. Carbonell saw him in 1989 the defendant had been in what has been referred to as "Q-Wing", i.e. punitive solitary confinement, for nine (9) years. By the time Dr. McClaine examined him, he had been in "Q-Wing" for eleven (11) years, and by the time Dr. Toomer saw him he had been there for sixteen (16) years. **The impact on the human mind [of] that nine (9) to sixteen (16) years in solitary confinement, in a six (6) by eight (8) foot cell, without any companionship but for the occasional check by a corrections officer, must be devastating. The court considers the passage of time in assessing the reliability of the opinions of the doctors who examined the defendant.**

(R. 1540-41) (emphasis added).

[3]Among the mitigating circumstances provided by Florida's death-penalty statute are that "[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance," §921.141 (6) (b), Fla. Stat. (1995), and that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired," § 921.141(6)(f), Fla. Stat. (1995).

Thus, assuming for the sake of argument that it is necessary to show personal suffering in order to question the constitutionality of execution after decades on death row, that supposed requirement (which was not mentioned by either the trial court or the Florida Supreme Court in denying the Lackey claim) was amply satisfied here.

II.

RESPONDENT ERRS IN CONTENDING THAT THE PETITIONER ACTUALLY BENEFITTED FROM THE DELAY.

The respondent also argues that Mr. Muhammad has benefitted by his prolonged incarceration on death row. (Response at 10-11, 16-18). According to the respondent, the reversal of the original sentence was predicated on this Court's decision in Hitchcock v. Dugger, 481 U.S. 393 (1987), and the 14-year delay between sentence (1975) and reversal (1989) allowed petitioner to benefit from that decision, (Response at 17-18), which, according to the respondent, changed the law by "invalidat[ing] Florida's prior standard jury

instructions with respect to consideration of non-statutory mitigating factors" (Response at 13).

Contrary to respondent's assertions, this Court's decision in Hitchcock was based on an "examination of the sentencing proceedings actually conducted in [Hitchcock's] case" and did not even reach the question of what was in fact required by Florida law. 481 U.S. at 397. This Court concluded, based on that examination of the record, that the proceedings did not comport with the requirements of Skipper v. South Carolina, 476 U.S. 1 (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978). 481 U.S. at 398-99. Thus, the constitutional requirements which required reversal of Mr. Muhmamad's original sentence had been recognized for years before his sentence was finally reversed in 1989. Indeed, in reversing based on what it referred to as Mr. Muhammad's "Lockett claim" the Eleventh Circuit Court of Appeals noted that "the Florida Supreme Court addressed the Lockett issue on the merits (albeit in the context of ineffectiveness) in Muhammad v. State, 426 So. 2d 533, 536 (Fla. 1981)." Knight v. Dugger, 863 F.2d 705, 708 n. 5 (11th Cir. 1988).

Moreover, the petitioner notes that according to the Florida Supreme Court's opinion in Songer v. State, 365 So. 2d 696, 700 (Fla. 1978), neither the death penalty statute nor the Florida Supreme Court's decisions construing it had ever precluded consideration of non-statutory mitigating evidence. Accordingly, the restrictions placed on the consideration of non-statutory mitigation during the 1975 sentencing proceeding, which led to reversal in 1989, were not only contrary to constitutional requirements recognized as early as 1978, they

were contrary to the requirements of the statute enacted in 1972. There was no "benefit" to Mr. Muhammad in having had to endure 14 years on death row before the necessity of a new sentencing proceeding was recognized by the courts.

In addition, the passage of time certainly did not have a beneficial effect on the presentation of the defense case. For example, in 1979, the state legislature enacted a new aggravating circumstance (cold, calculated, premeditated) which was used against the petitioner at resentencing. The sentencing judge discounted the opinions of those defense experts who had seen Mr. Muhammad after several years on death row, because of the "devastating" mental impact of prolonged incarceration under those conditions. (R. 1540-41). And as to the two defense expert witnesses who had examined Mr. Muhammad shortly after the crimes, the prosecutor described the testimony of one of them to the jury in the following terms: "He really did not have any recollection of this. He was the elderly man from Ocala who basically read his report to you, or report he had made many years ago." (T. 3831-32).

Finally, the devastating impact upon his mind of more than two decades on death row (R. 1540-41), cannot be considered a benefit, in any ordinary, human sense.

III.

RESPONDENT ERRS IN CONTENDING THAT CONSIDERATION OF THE CCP AGGRAVATING FACTOR COULD NOT HAVE AFFECTED THE RESULT.

The respondent argues that the result of the resentencing would have been the same even in the absence of the CCP aggravator, because the trial court found other aggravators

and stated that "even in the absence of this aggravating circumstance [CCP], the court's analysis and conclusions herein would not change." (Response at 19). However, in a weighing state such as Florida, in order to guarantee that application of an invalid aggravating circumstance did not deprive the defendant of the individualized sentence required by the Eighth Amendment, the state appellate court must either remand for resentencing or "itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error." Sochor v. Florida, 504 U.S. 527, 532 (1992); see also Stringer v. Black, 503 U.S. 222, 232 (1992).

Here, the Florida Supreme Court, which found no error in the application of CCP, certainly conducted no reweighing or harmless-error analysis with regard to this aggravator. The trial court's statement could not cure the error of applying the CCP aggravating circumstance to crimes which occurred several years before its enactment, in violation of the Ex Post Facto Clause. Aside from the fact that the trial judge also stated that he gave the CCP factor "great weight" (R. 1528), his analysis included another factor (HAC) to which he also gave "great weight," but which the Florida Supreme Court held was not supported by the evidence. Knight v. State, 721 So. 2d 287, 298-99 (Fla. 1998).

The respondent also notes that the petitioner was originally sentenced to death without the use of the CCP aggravator. (Response at 19). However, that fact is irrelevant because the weighing process which resulted in that sentence was held to be constitutionally defective. Se Knight, 863 F. 2d at 708-10.

IV.

RESPONDENT ERRS IN CONTENDING THAT THERE COULD BE NO EX POST FACTO VIOLATION BECAUSE AT THE TIME OF THE CRIMES ANOTHER STATUTORY AGGRAVATOR EXISTED WHICH INCLUDED THE CCP AGGRAVATING CIRCUMSTANCE.

The respondent argues that retrospective application of the cold, calculated, premeditated aggravating circumstance (CCP) did not violate the Ex Post Facto Clause because, according to the respondent, at the time of the commission of the crimes there was a statutory aggravating circumstance, namely heinous, atrocious or cruel (HAC), which "specifically encompassed and included" a cold, calculated design to kill, and that the subsequent enactment of CCP as a separate aggravating factor imposed limitations on the circumstances which could be considered in aggravation, and those limitations inured to the benefit of the defendant. (Response at 23-25).

This additional rationale was not mentioned by the Florida Supreme Court either in this case or in Combs v. State, 403 So. 2d 418 (Fla. 1981), where the retrospective application of CCP was first held not to constitute a violation of the Ex Post Facto Clause.

There are numerous decisions of the Florida Supreme Court which contradict the respondent's argument that HAC includes the CCP aggravating circumstance. Indeed, in Combs itself the Florida Supreme Court rejected the argument that HAC and CCP address the same aspect of the murder, and held that applying both aggravators did not constitute an impermissible "doubling up" of aggravating circumstances. Combs at 421.

In cases arising both before and after 1979, the Florida Supreme Court has held explicitly that even a premeditated, cold and calculated murder, is not HAC unless, as required by State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), the commission of the crime "was accompanied by such additional acts as to set the crimes apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." E.g., Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981) (error to find HAC based on the fact that "the murder was premeditated, cold and calculated and stealthily carried out," because, under the standard stated in Dixon, "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous atrocious, or cruel"); Cooper v. State, 336 So. 2d 1133, 1140-41 (Fla. 1976) ("execution-type murder" of police officer was not HAC); see also Menendez v. State, 368 So. 2d 1278, 1281-82 (Fla. 1979); Riley v. State, 366 So. 2d 19, 21 (Fla. 1978).

This continues to be the Florida Supreme Court's interpretation of HAC. In the present case, it was held to be error to find that the "execution-style killings" were HAC. Knight v. State, 721 So. 2d 287, 298-99 (Fla. 1998). By contrast, the case upon which the respondent most relies, Vaught v. State, 410 So. 2d 147 (Fla.1982 , appears never to have been cited in Florida for its discussion of HAC, and that discussion is incompatible with the Florida Supreme Court's previous and subsequent holdings that HAC refers to the unnecessarily torturous character of the murder, rather than to the defendant's intent to kill.

In addition, the legislative history shows that the enactment of CCP was a direct

response to cases such as Menendez and Riley, which involved "execution-style" killings but where HAC was held to be inapplicable. It was intended as an additional aggravating circumstance which would secure the death penalty in such cases. See Jonathan Kennedy, Florida's "cold, calculated and premeditated aggravating circumstance in death penalty cases, 17 Stetson L. Rev. 47, 59-60 (1987) (citing Senate Staff Analysis and Economic Impact Statement S523 at 4 (1979), and notes of Senator Guy Spicola).

There is no support for the argument that enactment of CCP somehow limited the HAC aggravator, which was left unchanged by the Florida Legislature. Thus, even if it is assumed for the sake of argument that what was enacted as CCP was included in HAC, this multiplication of aggravators could not possibly be beneficial to defendants, as the respondent contends. To the contrary, it is a substantial disadvantage since an additional aggravator may make a person death eligible who was not so before. In Florida, a death sentence based on a single aggravating circumstance will not be upheld unless there is little or nothing in mitigation. Jones v. State, 705 So. 2d 1364, 1366 (Fla. 1998) ("while this Court has on occasion affirmed a single-aggravator death sentence, it has done so *only where there was little or nothing in mitigation*") (original emphasis); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990) (same); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989) (same). This rule applies even where the sole aggravator is HAC. Nibert. Adding CCP to the list of statutory aggravators was a substantive and detrimental change. The retrospective application of that aggravator to the petitioner violated the Ex Post Facto Clause.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the writ should be granted.

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August 20, 1999

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SUPREME COURT OF THE UNITED STATES

THOMAS KNIGHT, AKA ASKARI ABDULLAH MUHAMMAD

98–9741 (6) *v.*

FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CAREY DEAN MOORE

99–5291 (6) *v.*

NEBRASKA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

Nos. 98–9741 and 99–5291. Decided November 8, 1999

The petitions for writs of certiorari are denied.

Opinion of JUSTICE STEVENS, respecting the denial of the petitions for writ of certiorari.

It seems appropriate to emphasize that the denial of these petitions for certiorari does not constitute a ruling on the merits. See, *e.g.*, *Barber* v. *Tennessee*, 513 U. S. 1184 (1995).

JUSTICE THOMAS, concurring in denial of certiorari.

I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed. Indeed, were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights,

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the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.[1]

It is worth noting, in addition, that, in most cases raising this novel claim, the delay in carrying out the prisoner's execution stems from this Court's Byzantine death penalty jurisprudence, *e.g.*, *Graham* v. *Collins*, 506 U. S. 461, 478 (1993) (THOMAS, J., concurring) (criticizing the Court's holding in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), that Texas special issues violated the Eighth Amendment by preventing the jury from giving effect to mitigating evidence); *Ohio Adult Parole Authority* v. *Woodard*, 523 U. S. 272, 279 (1998) (opinion of REHNQUIST, C. J.) (disagreeing with the view of five Members of this Court[2] that procedural due process principles govern a clemency hearing in which the clemency decision is entrusted to executive discretion); *Simmons* v. *South Carolina*, 512 U. S. 154, 178 (1994) (SCALIA, J., dissenting) (disputing Court's holding that due process compels a State to inform a

[1]In support of his claim, petitioner Knight cites Blackstone, who remarked that "a delayed execution 'affects the minds of the spectators rather as a terrible sight, than as the necessary consequence of transgression.' " Pet. for Cert. in No. 98–9741, p. 15 (quoting 4 W. Blackstone, Commentaries *397)). Blackstone was speaking of the effect speedy execution would have on deterring crime: "[P]unishment should follow the crime as early as possible; that the prospect of gratification or advantage, which tempts a man to commit the crime, should instantly awake the attendant idea of punishment." *Ibid.* In this regard, Blackstone observed that "throughout the kingdom, by statute 25 Geo. II. c. 37. it is enacted that, in case of murder, the judge shall in his sentence direct execution to be performed on the next day but one after sentence passed." *Ibid.* I have no doubt that such a system, if reenacted, would have the deterrent effect that JUSTICE BREYER finds lacking in the current system, but I am equally confident that such a procedure would find little support from this Court.

[2]See 523 U. S., at 288 (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 290 (STEVENS, J., concurring in part and dissenting in part).

sentencing jury of a capital defendant's ineligibility for parole); *Morgan* v. *Illinois*, 504 U. S. 719, 739 (1992) (SCALIA, J., dissenting) (disagreeing with the Court's holding that the Sixth Amendment requires exclusion of a sentencing juror who would always impose the death penalty upon proof of the defendant's guilt of a capital offense).[3] In that sense, JUSTICE BREYER is unmistakably correct when he notes that one cannot "justify lengthy delays [between conviction and sentence] by reference to [our] constitutional tradition." *Post*, at 3. Consistency would seem to demand that those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence. See *Coleman* v. *Balkcom*, 451 U. S. 949, 952 (1981) (STEVENS, J., concurring in denial of certiorari) ("However critical one may be of . . . protracted post-trial procedures, it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution"). It is incongruous to arm capital defendants with an arsenal of "constitutional" claims with which they may delay their executions, and simultaneously to complain when executions are inevitably delayed. See *Turner* v. *Jabe*, 58 F. 3d 924, 933 (CA4) (Luttig, J., concurring), cert. denied, 514 U. S. 1136 (1995); Kozinski & Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res. L. Rev. 1, 25 (1995).

[3]Furthermore, I observed prior to Congress' adoption of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, Tit. IV–B, §413(f), 110 Stat. 1269, that this Court has radically expanded federal habeas corpus review for state prisoners, which until AEDPA had been delineated in scope by an unchanged statutory formulation. See *Wright* v. *West*, 505 U. S. 277, 285–287 (1992) (opinion of THOMAS, J.) (tracing the expansion of federal habeas corpus relief from its original conception as a mechanism for prisoners to challenge the jurisdiction of the state court that had rendered judgment).

Ironically, the neoteric Eighth Amendment claim proposed by JUSTICE BREYER would further prolong collateral review by giving virtually every capital prisoner yet another ground on which to challenge and delay his execution. See U. S. Dept. of Justice, Bureau of Justice Statistics Bulletin, Capital Punishment 1997, p. 12 (Dec. 1998) (for prisoners executed between 1977 and 1997, the average elapsed time on death row was 111 months from the last sentencing date). The claim might, in addition, provide reviewing courts a perverse incentive to give short shrift to a capital defendant's legitimate claims so as to avoid violating the Eighth Amendment right suggested by JUSTICE BREYER. Cf. *United States* v. *Tateo*, 377 U. S. 463, 466 (1964) ("From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest").

Five years ago, JUSTICE STEVENS issued an invitation to state and lower courts to serve as "laboratories" in which the viability of this claim could receive further study. *Lackey* v. *Texas*, 514 U. S. 1045 (1995) (memorandum respecting denial of certiorari). These courts have resoundingly rejected the claim as meritless. See, *e.g.*, *People* v. *Frye*, 18 Cal. 4th 894, 1030–1031, 959 P. 2d 183, 262 (1998); *People* v. *Massie*, 19 Cal. 4th 550, 574, 967 P. 2d 29, 44–45 (1998); *Ex Parte Bush*, 695 So. 2d 138, 140 (Ala. 1997); *State* v. *Schackart*, 190 Ariz. 238, 259, 947 P. 2d 315, 336 (1997), cert. denied, 525 U. S. 862 (1998); *Bell* v. *State*, 938 S. W. 2d 35, 53 (Tex. Crim. App. 1996), cert. denied, 522 U. S. 827 (1997); *State* v. *Smith*, 280 Mont. 158, 183–184, 931 P. 2d 1272, 1287–1288 (1996); *White* v. *Johnson*, 79 F. 3d 432, 439–440 (CA5), cert. denied, 519 U. S. 911 (1996); *Stafford* v. *Ward*, 59 F. 3d 1025, 1028 (CA10 1995).[4] I submit that the Court should consider the experiment concluded.

[4]Each of these cases rejected the claim on the merits. I am not aware of a single American court that has accepted such an Eighth Amendment claim. Some judges have dismissed the claim in the strongest of terms. See, *e.g.*, *Turner* v. *Jabe*, 58 F. 3d 924, 933 (CA4 1995) (Luttig, J., concurring) (describing a similar claim as a "mockery of our system of justice, and an affront to lawabiding citizens").

SUPREME COURT OF THE UNITED STATES

THOMAS KNIGHT, AKA ASKARI ABDULLAH MUHAMMAD

98–9741 (1) *v.*

FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CAREY DEAN MOORE

99–5291 (1) *v.*

NEBRASKA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

Nos. 98–9741 and 99–5291. Decided November 8, 1999

JUSTICE BREYER, dissenting from the denial of certiorari.

These petitions ask us to consider whether the Eighth Amendment prohibits as "cruel and unusual punishmen[t]" the execution of prisoners who have spent nearly 20 years or more on death row. Both of these cases involve astonishingly long delays flowing in significant part from constitutionally defective death penalty procedures. Where a delay, measured in decades, reflects the State's own failure to comply with the Constitution's demands, the claim that time has rendered the execution inhuman is a particularly strong one. I believe this Court should consider that claim now. See *Lackey* v. *Texas*, 514 U. S. 1045 (1995) (STEVENS, J., respecting denial of certiorari); *Elledge* v. *Florida*, 525 U. S. 944 (1998) (BREYER, J., dissenting from denial of certiorari).

The petitioner in *Moore* v. *Nebraska* was sentenced to death on June 20, 1980, more than 19 years ago. By mid-

1982, Moore had invoked all his direct appellate remedies and lost. By mid-1984, he had invoked all state collateral remedies and lost. But in 1988 a Federal District Court agreed with Moore that Nebraska's death sentence procedures violated the Constitution because its standards were too vague, permitting the death penalty's arbitrary application. See *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*. The District Court issued a writ of habeas corpus. The Eighth Circuit affirmed. And in May 1992, this Court denied the State's petition for certiorari, making final the lower federal court decision in Moore's favor.

In April 1995, after modifying its death sentence procedures and 15 years after Moore's first sentencing proceeding, the State held a new sentencing proceeding; Moore was again sentenced to death. By April 1997, Moore had invoked all direct appellate remedies and lost. He then invoked state collateral review and lost in the lower courts. See 210 Neb. 457, 316 N. W. 2d 33 (1982). He now seeks certiorari, asking us to review his claim of inordinate delay (among others)—19 years and 4 months after he was first sentenced to death.

The petitioner in *Knight* v. *Florida* was sentenced to death on April 21, 1975, nearly 25 years ago. By mid-1976, Knight had invoked all his direct appellate remedies and lost. By mid-1983, he had invoked all state collateral remedies and lost. But Knight had also filed a petition for habeas corpus in federal court; and in December 1988, the Federal Court of Appeals for the Eleventh Circuit found that Florida's death penalty sentencing procedure was constitutionally defective because it did not require the jury to take account of an unusually traumatic and abusive childhood as a potentially mitigating factor. See *Lockett* v. *Ohio*, 438 U. S. 586 (1978). The Court of Appeals ordered a new sentencing proceeding.

In February 1996, the State held a new proceeding, and Knight was again sentenced to death. In November 1998, the Florida Supreme Court affirmed. 721 So. 2d 287 (1998). Knight now seeks certiorari, asking us to review his claim of inordinate delay (among others)—24 years and 6 months after he was first sentenced to death.

It is difficult to deny the suffering inherent in a prolonged wait for execution—a matter which courts and individual judges have long recognized. See *Lackey*, *supra*, at 1045–1047. More than a century ago, this Court described as "horrible" the "feelings" that accompany uncertainty about whether, or when, the execution will take place. *In re Medley*, 134 U. S. 160, 172 (1890). The California Supreme Court has referred to the "dehumanizing effects of . . . lengthy imprisonment prior to execution." *People* v. *Anderson*, 6 Cal. 3d 628, 649, 493 P. 2d 880, 894 (1972). In *Furman* v. *Georgia*, *supra*, at 288–289 (concurring opinion), Justice Brennan wrote of the "inevitable long wait" that exacts "a frightful toll." Justice Frankfurter noted that the "onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." *Solesbee* v. *Balkcom*, 339 U. S. 9, 14 (1950) (dissenting opinion). See Strafer, Volunteering for Execution, 74 J. Crim. L. & C. 860, 872, n. 44 (1983) (a study of Florida inmates showed that 35% of those confined on death row attempted suicide; 42% seriously considered suicide). And death row conditions of special isolation may well aggravate that suffering. See Connolly, Better Never Than Late, 23 New Eng. J. on Crim. & Civ. Confinement 101, 121 (1997); Strafer, *supra*, at 870–871, n. 37.

At the same time, the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes. *Lackey*, *supra*, at 1046. Nor can one justify lengthy delays by reference to constitutional tradition, for our Constitution was written at a time when delay between sentencing

and execution could be measured in days or weeks, not decades. See *Pratt* v. *Attorney General of Jamaica*, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc) (Great Britain's "Murder Act" of 1751 prescribed that execution take place on the next day but one after sentence).

A growing number of courts outside the United States—*courts that accept or assume the lawfulness of the death penalty*—have held that lengthy delay in administering a *lawful* death penalty renders ultimate execution inhuman, degrading, or unusually cruel. In *Pratt* v. *Attorney General of Jamaica*, *supra*, for example, the Privy Council considered whether Jamaica lawfully could execute two prisoners held for 14 years after sentencing. The Council noted that Jamaican law authorized the death penalty and that the United Nations Committee on Human Rights has written that "'capital punishment is not per se unlawful under the [Human Rights] Covenant.'" *Id.*, at 26, 4 All E. R., at 780. But the Privy Council concluded that it was an "inhuman act to keep a man facing the agony of execution over a long extended period of time," *id.*, at 29, 4 All E. R., at 783, and the delay of 14 years was "shocking," *id.*, at 33, 4 All E. R., at 786. It held that the delay (and presumptively any delay of more than five years) was "'inhuman or degrading punishment or other treatment'" forbidden by Jamaica's Constitution unless "due entirely to the fault of the accused." *Id.*, at 29, 4 All E. R., at 783.

The Supreme Court of India has held that an appellate court, which itself has authority to sentence, must take account of delay when deciding whether to impose a death penalty. *Sher Singh* v. *State of Punjab*, A. I. R. 1983 S. C. 465. A condemned prisoner may ask whether it is "just and fair" to permit execution in instances of "[p]rolonged delay." *Id.*, at 470–471. The Supreme Court of Zimbabwe, after surveying holdings of many foreign courts, concluded that delays of five and six years were "inordinate" and

constituted "'torture or . . . inhuman or degrading punishment or other such treatment.'" *Catholic Commission for Justice and Peace in Zimbabwe* v. *Attorney-General*, [1993] 1 Zimb. L. R. 239, 240, 269 (S) (Aug. 4, 1999), http://www.law.wits.ac.za/salr/catholic.html. And the European Court of Human Rights, interpreting the European Convention on Human Rights, noted the convention did not forbid capital punishment. But, in the Court's view, the convention nonetheless prohibited the United Kingdom from extraditing a potential defendant to the Commonwealth of Virginia—in large part because the 6- to 8-year delay that typically accompanied a death sentence amounts to "cruel, inhuman, [or] degrading treatment or punishment" forbidden by the convention. *Soering* v. *United Kingdom*, 11 Eur. Ct. H. R. (ser. A), pp. 439, 478, ¶111 (1989).

Not all foreign authority reaches the same conclusion. The Supreme Court of Canada, for example, held that Canadian constitutional standards, though roughly similar to those of the European Convention on Human Rights, did *not* bar extradition to the United States of a defendant facing the death penalty. *Kindler* v. *Minister of Justice*, [1991] 2 S. C. R. 779, 838 (joint opinion). And the United Nations Human Rights Committee has written that a delay of 10 years does *not* necessarily violate roughly similar standards set forth in the Universal Declaration of Human Rights. Views adopted by the United Nations Human Rights Committee, 44th Sess., Mar. 30, 1992, *In re: Barrett* v. *Jamaica* (Nos. 270/1988 and 271/1988) §8.4. Given the closeness of the Canadian Court's decision (4 to 3) and language that the United Nations Human Rights Committee used to describe the ten-year delay ("disturbingly long"), one cannot be certain what position those bodies would take in respect to delays of 19 and 24 years.

Obviously this foreign authority does not bind us. After

all, we are interpreting a "Constitution for the United States of America." *Thompson* v. *Oklahoma*, 487 U. S. 815, 868, n. 4 (1988) (SCALIA, J., dissenting). And indeed, after *Soering*, the United States Senate insisted on reservations to language imposing similar standards in various human rights treaties, specifying, for example, that the language in question did not "restrict or prohibit the United States from applying the death penalty consistent with the . . . Constitution, including any constitutional period of confinement prior to the imposition of the death penalty." 136 Cong. Rec. 36192–36199 (Oct. 27, 1990) (U. S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

Nonetheless, the treaty reservations say nothing about whether a particular "period of confinement" is "constitutional." And this Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances. In doing so, the Court has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment. *Thompson* v. *Oklahoma*, *supra*, at 830–831 (opinion of STEVENS, J.) (considering practices of Anglo-American nations regarding executing juveniles); *Enmund* v. *Florida*, 458 U. S. 782, 796–797, n. 22 (1982) (noting that the doctrine of felony murder has been eliminated or restricted in England, India, Canada, and a "number of other Commonwealth countries"); *Coker* v. *Georgia*, 433 U. S. 584, 596, n. 10 (1977) (observing that only 3 of 60 nations surveyed in 1965 retained the death penalty for rape); *Trop* v. *Dulles*, 356 U. S. 86, 102–103 (1958) (noting that only 2 of 84 countries surveyed imposed denationalization as a penalty for desertion). See also *Washington* v. *Glucksberg*, 521 U. S. 702, 710, n. 8, and 718–719, n. 16 (1997) (surveying other nations' laws regarding assisted suicide); *Culombe* v. *Connecticut*, 367 U. S. 568, 583–584, n. 25, and 588 (1961) (considering English practice concerning police interrogation of suspects); *Kilbourn* v. *Thompson*, 103 U. S. 168, 183–189 (1881) (referring to the practices of Parliament in determining whether the House of Representatives has the power to hold a witness in contempt). Willingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a "decent respect to the opinions of mankind."

In these cases, the foreign courts I have mentioned have considered roughly comparable questions under roughly comparable legal standards. Each court has held or assumed that those standards permit application of the death penalty itself. Consequently, I believe their views are useful even though not binding.

Further, the force of the major countervailing argument is diminished in these two cases. That argument (as set out by the Human Rights Commission) recognizes that there must be an "element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies." *Barrett*, *supra*, §8.4. It claims that "even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies." *Ibid.* As the Canadian Supreme Court noted, "a defendant is never forced to undergo the full appeal procedure, but the vast majority choose to do so. It would be ironic if delay caused by the appellant's taking advantage of the full and generous avenue of the appeals available to him should be viewed as a violation of fundamental justice." *Kindler*, *supra*, at 838; see also *Richmond* v. *Lewis*, 948 F. 2d 1473, 1491–1492 (CA9 1990).

The cases before us, however, involve delays which resulted in large part from the States' failure to apply constitutionally sufficient procedures at the time of initial sentencing. They also involve extensive delays of close to two decades or more. The petitioners argue that the state-induced portion of the delay, perhaps up to 12 years in Moore's case, up to 15 years in Knight's, should not be charged against them in any constitutional calculus. Cf. *Pratt*, 2 A. C., at 29, 4 All E. R., at 783 (counting against the prisoner only that portion of the delay caused by "escape . . . or frivolous and time wasting resort to legal procedures"). Twenty years or more could not be necessary to provide a "reasonable time for appeal and consideration of reprieve." *Id.*, at 33, 4 All E. R., at 786. For these reasons, I think petitioners' argument cannot be rejected out of hand.

Nor do I agree with JUSTICE THOMAS that the lower courts have "resoundingly rejected" petitioner's claim. *Ante*, at 4. I have found about two dozen post-1995 lower court cases in which prisoners have raised *Lackey* claims. Most involve procedural failings that in part or in whole determined the outcome of the case. Of the eight cases (other than the two cases below) that decided Lackey claims solely on the merits, only four involve lengthy delays for which the State arguably bears responsibility. See *Bell* v. *State*, 938 S. W. 2d 35 (Tex. Crim. App. 1996) (20 years; conviction overturned once); *Ex parte Bush*, 695 So. 2d 138 (Ala. 1997) (16 years; conviction overturned twice); *State* v. *Smith*, 280 Mont. 158, 931 P. 2d 1272 (1996) (13 years; sentence overturned once); *People* v. *Massie*, 19 Cal. 4th 550, 967 P. 2d 29 (1998) (16 years; sentence overturned once). Neither the opinions in these four cases, nor those in any other of the lower court cases that I have found, discuss the potential significance of that state responsibility at any length. Thus, although the experiment may have begun, it is hardly evident that we

"should consider the experiment concluded." *Ante*, at 4–5.

Finally, the constitutional issue, even if limited to delays of close to 20 years or more, has considerable practical importance. Available statistics indicate that as of two years ago, December 1997, 24 prisoners sentenced to death had been on death row for more than 20 years. At that time 125 prisoners on death row had been sentenced in or before 1980 and therefore may now fall within the relevant category. U. S. Dept. of Justice, Bureau of Justice Statistics Bulletin, Capital Punishment 1997, p. 13 (Dec. 1998). Given these figures and the nature of the question, despite the absence of a division among the lower federal courts, this Court should consider the issue.

I would grant the petitions for certiorari in these two cases.